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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 169.

GEORGE W. THOMAS, ALFRED S. PORTER, AND NATHANIEL F. CHEW, PLAINTIFFS IN ERROR,

vs.

THE WEST JERSEY RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED AUGUST 16, 1877.

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1 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

The President of the United States to the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew are plaintiffs, and The West Jersey Railroad Company is defendant in a plea of covenant, a manifest error has intervened, to the great damage of the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf: You are hereby commanded that if judgment thereof be given, then under your seal, you do distinctly and openly send the record and process in the suit aforesaid with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this sixteenth day of April, A. D. one thousand eight hundred and seventy-seven, and in the one hundred and first year of the Independence of the said United States.

SAMUEL BELL,
Clerk of Circuit Court U. S.

Allowed.

W. McKENNAN,
Circuit Judge.

APRIL 16TH, 1877.

2 The United States of America to The West Jersey Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

W. McKENNAN,
Cir. Judge.

3 Service accepted.

SAML. DICKSON,
Att'y for West Jersey R. R. Co.

4 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. October session, 1875.

GEORGE W. THOMAS, ALFRED S. PORTER, and Nathaniel F. Chew
vs.
THE WEST JERSEY RAILROAD COMPANY. } No. 94.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit of October session, 1875, No. 94.

It is thus contained:

Be it remembered that on the seventh day of February, A. D. 1876, Samuel Dickson, esquire, one of the attorneys and counsellors of the said court, appears and presents a certified copy of the record and proceedings of the court of common pleas, No. 1, for the county of Philadelphia, in a certain cause therein lately depending, wherein
5 George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew are plaintiffs, and The West Jersey Railroad Company is defendant. The said record and proceedings, being certified in accordance with the act of Congress in such case made and provided, and the same being filed, is in the words and figures following, to wit:

6 EXEMPLIFICATION.

PHILADELPHIA COUNTY,
State of Pennsylvania, set:

Among the records and proceedings of the court of common pleas No. one for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 861, September term, 1875, to wit:

Docket entries, September term, 1875.

GEORGE W. THOMAS, ALFRED S. PORTER, AND Nathaniel F. Chew
vs.
THE WEST JERSEY RAILROAD COMPANY. } 861.

Summons covenant.

Exit, Oct. 30, 1875. Ret'ble 1 Mon. Nov., 1875.

Jan'y 22, 1875.—Petition filed for removal of cause to circuit court of the United States.

Dec. 8, 1875, narr. filed.

Eo die order of court made and entered in Minute Book No. 2, page 117.

A. B. Shearer.

7 C. P., No. . Sept. T., 1875.

GEORGE W. THOMAS, ALFRED S. PORTER, AND Nathaniel F. Chew
vs.
THE WEST JERSEY RAILROAD COMPANY. } No. .

Issue writ of summons covenant as above. Ret'ble 1st Mon. in Nov., 1875.

A. B. SHEARER,
Att'y for Pl'ffs.

To Proth'y C. P.
Oct. 30, 1875.

(Endorsed:) Sept. T. 1875. C. P., No. . George W. Thomas, Alfred S. Porter, & Nathaniel F. Chew vs. The West Jersey Railroad Co. Præcipe sum's covenant. Shearer for p'lffs. 861. Sept., '75. Geo. W. Thomas et al., vs. R. R. Co. Summons cov't. Shearer.

8 C. P. No. 1. September term, 1875.

GEORGE W. THOMAS, ALFRED S. PORTER, AND Nathaniel F. Chew
vs.
THE WEST JERSEY RAILROAD COMPANY. } No. 861.

PHILADELPHIA COUNTY, *ss:*

The West Jersey Railroad Company was summoned to answer George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of a plea of breach of covenant. And thereupon, the said plaintiffs, by A. B. Shearer, their attorney, complain for that, whereas, heretofore, to wit, on the 8th day of October, A. D. 1863, The Millville and Glassboro' Railroad Company, a corporation of the State of New Jersey, did demise, lease, set, and to farm let unto the said plaintiffs, all the roadway and superstructure of and belonging to said railroad company, lying and being between the towns of Millville and Glassboro', in the State of New Jersey, to wit, in the county aforesaid, together with all the buildings, machine shops, offices, stations, rolling stock, machinery, implements, and materials of and belonging to said railroad company, on and along the line of said railroad, for the term of twenty years from the first day of August, A. D. 1863, and thence next ensuing, by a certain contract and agreement under the seals of the parties thereto, bearing date a certain day and year therein named, to wit, the day and year first aforesaid, and made and entered into by and between the said The Millville and Glassboro' Railroad Company of the first part, and the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of the second part, and Richard D. Wood, for himself, his heirs, executors, and administrators, of the third part, which said contract is in the words following, to wit:

Contract and agreement, made and entered into the eighth day of October, A. D. 1863, between The Millville and Glassboro' Railroad Company of the first part, and George W. Thomas, Alfred S. Porter, and N. Frank Chew, of Millville, New Jersey, of the second part, and Richard D. Wood, of Philadelphia, and his heirs, executors, and administrators, of the third part.

Whereas, at a meeting of the stockholders of The Millville and Glass-

boro' Railroad Company, held at Millville the fourteenth day of July, A. D. 1863, it was proposed to lease the railroad, and it was then judged best to refer the same to the next meeting of the board of directors, with power to act; and at the next meeting of that board, held on the same day and at the same place, the following resolution was offered, to wit:

"Resolved, That Thomas H. Whitney, Ferdinand F. Sharp, and Richard D. Wood be appointed as an executive committee to conduct the general business of this company, and that they be empowered to lease the road in perpetuity or for one or more years, as they may deem best for the interest of the concern, taking proper care to contract with responsible lessees"—

On motion, it was resolved to amend the above resolution, so that any contract made by the therein-named executive committee should be submitted to the directors and be by them approved before said contract should be binding upon this company. On motion, the above resolution as amended was adopted.

And whereas, in pursuance of this authority and of all other authority them in that behalf enabling, the party of the first part is desirous to contract for the transportation of freight, mails, and passengers over their railroad, and the party of the second part has proposed to them to undertake the same upon the terms and as hereinafter mentioned, and to furnish all the necessary rolling stock, labor, and materials, and also to perform and fulfill all and singular the duties and obligations hereinafter mentioned and assumed, which proposition the party of the first part has agreed to accept, upon the conditions and provisions hereinafter contained on the part of and by the party of the second part to be observed and kept:

First. Now this contract and agreement witnesseth, that the party of the first part does hereby and for the purpose of enabling the party of the second part to fulfill this contract, entrust to their possession
9 and care and subject to the provisions of this contract all the roadway and superstructure, buildings, machine-shops, offices, stations, rolling stock, machinery, implements, and materials on and along the line of said railroad, of which a schedule is hereto annexed, marked A. And the party of the second part hereby acknowledges the receipt of the said property for the purposes aforesaid, and the said property has been duly valued and appraised, and it is agreed that the valuation affixed to each article thereof in the said schedule is the just and true value thereof on the first day of August, A. D. 1863, being the time of the delivery of the property therein described to the party of the second part.

Second. That the party of the second part shall and will provide all the needful cars and engines for transporting, and will duly transport all passengers, mails, and freight, whether through or local, offering or delivered to them to be transported, and shall and will fulfill all the duties and liabilities of the party of the first part to the public.

Third. That the party of the second part shall and will, at their own cost, maintain the roadway or superstructure of the said railroad and the rolling stock thereof in their present good working condition; and shall and will, at their own cost, defray all the expenses and charges of running said railroad, and the expenses of all current renewals or repairs, and shall and will, in pursuance of these provisions, keep and pay all needful and prudent persons for performing the labor necessary to fulfill their obligations as herein expressed; and shall and will furnish at their own expense all necessary materials, including fuel, oil, tallow, and waste, and pay all water rents; and the party of the second part shall

and will at all times indemnify and save harmless the party of the first part and their property for, from, and against all loss, outlay, and cost and damage for or by reason of any labor or material already or at any time hereafter so done or furnished, and from and against the claim of any person or persons therefor.

Fourth. And the party of the second part does hereby assume and take upon themselves all loss, cost, and damage of every nature, which may result to persons or property by reason of any matter or thing connected with this contract, and done or omitted by them thereunder, but not for any loss, cost, or damage incurred by act of God or by act of the public enemies.

Fifth. That the party of the second part shall and will, at their own expense, forthwith effect full and sufficient insurances, in the name of the party of the first part and for their interest, against damage or loss by fire, upon the station-house at Millville and the engine-houses at the same place, and the engine-house at Glassboro', and shall and will keep the same insured during the continuance of this contract, or until the said buildings shall or may, at their cost, have been replaced by others of equal or greater value, as hereinafter provided, in which case the new buildings shall and will be insured in like manner by the party of the second part to the full value of the buildings removed to make place for the same; and the value of said buildings is ascertained in the schedule hereunto annexed marked B.

Sixth. That the party of the second part shall and will, whenever required so to do by a resolution of the board of directors of the railroad company, party of the first part, forthwith discharge from their service or employ any person or persons employed under or in pursuance of this contract, whom the party of the first part may desire to have discharged.

Seventh. That the party of the second part shall and will at all times carry from point to point along the said road, in the regular trains running thereon, the directors and officers of said railroad, and of the West Jersey Railroad, and of the Cape May and Millville Railroad, free of charge, and also such other persons as the laws of New Jersey require to be carried.

Eighth. That the party of the second part shall and will, from time to time, at their own cost and expense, place upon the said railroad, in addition to the rolling stock described in the schedule hereto annexed, such further rolling stock as may be necessary to transport all the passengers, mails, and freight offering or delivered to them to be transported; and shall further have power at their own cost and expense, and at such times and places as they may deem most suitable for fulfilling the purposes of this contract (provided such places shall be within the limits of property belonging to the party of the first part, and the plan thereof be first approved by the board of directors appointed by said party of the first part), to erect buildings for station-houses, engine-houses, tool-shops, wood-sheds, and water-tanks, and to lay side tracks, switches, and turnouts. But if, in pursuance of this provision, the party of the second part shall substitute any new in the place of any old buildings or other property, the value of the new buildings or property shall be equal to or greater than the value of the old at the date of this contract, and at the termination of this contract the value of the old buildings or property shall be deducted from the value of the new, in making the appraisement under which the parties hereto are to perfect their settlement at the time of such termination, as does hereinafter more fully appear.

Ninth. That the party of the second part shall and will collect all the bills, charges, and earnings due from the transportation of passengers, mails, and freights over the said road, and all or any other sum or sums due upon property of said railroad, entrusted to them by this contract, and shall and will pay one-half of the gross sum thus collected over to the party of the first part in quarterly installments, upon the first days of November, February, May, and August, beginning November 1st, A. D. 1863.

Tenth. That the party of the second part shall and will, from and out of the other one-half of the gross sum so collected as aforesaid, which is reserved to themselves, pay the yearly sum of $10,000 in monthly installments, beginning on the first day of September, A. D. 1863, into the hands of the party of the third part, subject to the provisions hereinafter expressed.

Eleventh. And it is mutually understood and agreed between the several parties hereto, that the said yearly payment of $10,000 shall remain in the hands of the party of the third part as a fund to indemnify the party of the first part against any loss by deterioration of the roadway or superstructure, and of the rolling stock and buildings belonging or appurtenant thereto, below their present good working condition, or their value, as expressed in the schedules hereto annexed, marked A and B, and against any loss incurred or which may be incurred by any matter or thing done or omitted by the party of the second part under or by reason of this contract. And the party of the third part does hereby agree to become liable for and chargeable with interest upon all payments made to him on account of the said fund, at the rate of five per cent. per annum, and once in every year to add this interest, payable as thus agreed upon, to the principal sum of said fund, and to hold the moneys thus obtained subject to the covenants of this contract.

Twelfth. It is mutually agreed that the said fund shall be appropriated to lay new ties to take the place of those destroyed by use or action of the weather; to replace the iron rails when worn unfit for use; or to renew the engines, cars, or other rolling stock, either by purchase, as may from time to time become necessary, or by repairs necessary to maintain and perpetuate the said stock as described in schedule A. And no appropriation of said fund shall be made to defray running expenses nor current repairs, nor any loss caused by accident, except to indemnify the party of the first part as hereinafter provided. And it is further mutually understood and agreed, that in case of dispute between the parties hereto as to what are "current repairs," and what are "repairs necessary to maintain and perpetuate either roadway or rolling stock," such question or dispute shall be decided by some competent engineer, to be then or from time to time designated or appointed by the party of the first part, to consider and decide upon such question, and the decision of such engineer, when placed in writing, shall be conclusive, obligatory, and binding upon the parties hereto.

Thirteenth. And the said fund shall be further liable for and applied to indemnify and save harmless the party of the first part for and from any loss on account of any matter or thing done or omitted by the party of the second part or their agents, under or by reason of this contract, and against any and every breach of the party of the second part of any covenant herein contained.

Fourteenth. That no appropriation of said fund shall be made except only by an order of the board of directors, appointed by the party of the first part, and upon the authority of such order the party of the

third part shall pay the sum or sums as required by said order, to the party of the second part, who shall and will apply the same to the purpose of the board of directors, and such payment shall relieve the party of the third part as to and from all liability or responsibility for or in respect to the money so paid.

Fifteenth. That in case the party of the second part shall at any time omit to pay the quarterly installments of one-half the gross sum received or obtained by them under or in consequence of this contract, for thirty days after any such installments may have become due as herein provided, or shall omit to pay the monthly installments of the $10,000, as herein provided, for fifteen days after the said installments may have become due, then without notice or demand the board of directors,
11 at their option, shall have power forthwith to enter upon and take possession of said railroad and all the rolling stock and buildings appurtenant or belonging thereto, and this contract shall be at an end except so far as may be necessary to secure and indemnify the party of the first part against any loss or damage on account of any breach of this contract by or on behalf of the party of the second part, committed prior to the termination thereof.

Sixteenth. That in case of the death of either of the persons of the party of the second part before the expiration or sooner termination of this contract, then and in such case this contract shall be at an end, and the party of the first part shall forthwith enter upon and take possession of said railroad and the buildings and rolling stock belonging or appurtenant thereto or used thereon.

Seventeenth. That the party of the first part shall at any time have the right to put an end to this contract and to all the rights thereby given, and retake possession of the railroad and rolling stock and buildings belonging or appurtenant thereto, and upon three months' notice to that effect given to the party of the second part, or to either of the persons thereof; but upon the termination of this contract, according to the notice thus provided, if the party of the second part shall so desire, then the party of the first part shall and will appoint a competent and disinterested person, who, together with another competent and disinterested person, appointed by the party of the second part, shall consider and decide upon the value of this contract to the party of the second part, and the loss and damage incurred by and justly and equitably due to them by reason of such termination thereof, and in the event of any difference between the persons so appointed, as aforesaid, as to the amount of damage justly and equitably due to the party of the second part, as aforesaid, then and in such case the said two persons shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third be chosen, shall be final, conclusive, and binding upon the parties thereto.

Eighteenth. That at the expiration of this contract, or other sooner termination thereof, the party of the first part shall thereupon immediately take possession of all the property, real or personal, which the party of the second part may have in their custody under or in pursuance of this contract. And the party of the second part shall and will promptly and quietly surrender the same in good order and repair. And it is mutually understood and agreed, that upon such taking possession, the property so taken possession of shall be valued and appraised by two competent and disinterested persons, one to be chosen by the party of the first part, and the other by the party of the second part. And if the total valuation and appraisement shall be found to

exceed the ascertained value of the property, whether real or personal, entrusted to the party of the second part, under or in pursuance of this contract, then in such case the party of the first part shall and will thereupon pay to the party of the second part the amount of such excess. But if upon such valuation it shall be found that the said property has deteriorated in value to a sum less than affixed thereto at the time of entrusting the same, as aforesaid, then and in such case the amount of such depreciation shall be paid by the party of the third part out of the fund placed in his hands, as hereinbefore provided. And if the amount of said fund shall not be sufficient to make good the amount of such depreciation, then and in such case the party of the second part shall and will make good the deficit.

Nineteenth. That the party of the third part shall and will, at the expiration or sooner termination of this contract, pay over to the party of the second part the fund placed in his hands, as aforesaid, after having deducted therefrom all sums necessary to make good and defray any depreciation in the value of the railroad and rolling stock and buildings belonging or appurtenent thereto; and any loss by reason of any or every breach of any of the covenants on the part of the party of the second part herein contained; and any loss by accident occurring on said railroad or by anything done or omitted by the party of the second part, under or by reason of this contract.

Twentieth. And it is mutually understood and agreed between the parties hereto, that if either the party of the first part or second part shall refuse or omit, for the period of three days after any request so to do, to name a competent and disinterested person to make the valuation or appraisement herein provided, then and in such case, at the expiration of said three days, the party not making such default shall name another competent and disinterested person to act for such party in default, and the two persons thus acting, as aforesaid (whether named by the two parties, as aforesaid, or by one party in default of the other, as aforesaid), in the event of any difference between them
12 as to the subject of such reference, shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or a majority of said three persons, if a third be chosen, shall be final, conclusive, and binding upon the parties hereto.

Twenty-first. And it is mutually understood and agreed that no claim arising from any parol understanding or agreement, whether past or to come, shall at any time be set up by either party hereto to affect the various covenants and agreements herein expressed, or to give any cause of action whatever to either of the parties hereto.

Twenty-second. And it is mutually understood and agreed that this contract shall take effect as though executed and binding upon the first day of August, A. D. eighteen hundred and sixty three, and shall continue to be of effect and binding until the first day of August, eighteen hundred and eighty-three, unless otherwise sooner terminated, according to the various covenants and agreements herein contained.

In witness whereof the parties hereto have severally placed their hands and seals the day and year first hereinbefore written.

Sealed, signed, and delivered in the presence of—

[SEAL.] WILLIAM D. KEMBLE,
Secretary.

Witnesses present:

WILLIAM D. KEMBLE.
THOMAS H. WHITNEY, *President.* [SEAL.]
GEORGE W. THOMAS. [SEAL.]
N. FRANK CHEW. [SEAL.]
A. S. PORTER. [SEAL.]
RICHARD D. WOOD. [SEAL.]

Which said contract and agreement being in the possession and control of the said defendant, the said plaintiffs cannot produce the same to the court here. Under and by virtue of which said contract the said plaintiffs afterwards, to wit, on the day and year first aforesaid, in New Jersey, to wit, in the county aforesaid, entered upon and took possession of said Millville and Glassboro' roadway and superstructure, buildings, machine-shops, offices, stations, rolling-stock, machin-
13 ery, implements, and materials on and along the line of said railroad, and continued in the possession, use, and enjoyment thereof to and until the termination of said contract by the said The Millville and Glassboro' Railroad Company, as hereinafter set forth, yielding and paying unto the said Millville and Glassboro' Railroad Company, in quarterly payments, on the first days of November, February, May, and August, in each and every year during the continuance of said contract, one-half of the gross sum of all the tolls, charges, and earnings due from and earned for the transportation of freight, mails, and passengers over the line of said railroad, and of all and every sum and sums of money due upon the property of said railroad company, entrusted to said plaintiffs under and by virtue of said contract, and said plaintiffs have always, from the time of making said contract and until the termination thereof by the said Millville and Glassboro' Railroad Company, as hereinafter set forth, well and truly performed, fulfilled, and kept all things in said contract on their part to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof, to wit, in New Jersey, to wit, at the county aforesaid; and the said plaintiff says that afterwards, to wit, on the 12th day of October, 1867, and while the said plaintiffs were in the possession and enjoyment of said railroad, buildings, machine-shops, offices, stations, rolling-stock, and other property, under and by virtue of said contract, the said The Millville and Glassboro' Railroad Company made an agreement with the West Jersey Railroad Company, the above defendant (also a corporation of the State of New Jersey), to wit, in New Jersey, to wit, in the county aforesaid, providing, among other things, for the consolidation of said two corporations, and the transfer and assignment of all the property and effects of the said The Millville and Glassboro' Railroad Company to the said defendant corporation, and the merger of the said The Millville and Glassboro' Railroad Company, with all its franchises, rights, and property, in the said defendant corporation, which last-mentioned agreement was afterwards confirmed by an act of the legislature of the State of New Jersey, approved the 18th day of March, A. D. 1868, entitled "An act to consolidate the railroad lines of West Jersey," which said act provided, among other things, in effect, that the said

The West Jersey Railroad Company, the said defendant, should be liable for all the debts, liabilities, and obligations of the said The Millville and Glassboro' Railroad Company.

In pursuance of said agreement between the said defendant and the said The Millville and Glassboro' Railroad Company, and by authority and by virtue of the said act of the legislature of the State of New Jersey, the said The Millville and Glassboro' Railroad Company afterwards, to wit, on the 1st day of April, A. D. 1868, to wit, in New Jersey, to wit, in the county aforesaid, transferred and assigned all its railroad, superstructure, rolling-stock, buildings, stations, offices, machine-shops and other property to, and became merged, with all its franchises, rights and property, into the said The West Jersey Railroad Company, the said defendant; and the said defendant then and there became liable to perform, fulfill, and keep all the covenants and things in the first above-mentioned contract on the part of the said The Millville and Glassboro' Railroad Company, to be performed, fulfilled, and kept according to the form and effect, true intent and meaning thereof, to wit, in New Jersey, to wit, in the county aforesaid; and the said plaintiffs further say that before the said act of the legislature of the State of New Jersey was passed, and while the said plaintiffs were in the possession and enjoyment of the said The Millville and Glassboro' Railroad, rolling-stock, buildings, and other property on and along the line of said railroad, under and by virtue of said first-mentioned contract, to wit, on the 8th day of November, A. D. 1867, the said The Millville and Glassboro' Railroad Company, by virtue of a right in said first-mentioned contract reserved, to terminate said contract and to retake possession of said railroad, rolling stock, buildings, and other property in possession of said plaintiffs, under said contract, upon three months' notice to the said plaintiffs, or either of them, served a notice upon the said plaintiffs in effect requiring said plaintiffs to surrender and give up possession of said Millville and Glassboro' Railroad, superstructure, rolling-stock, buildings, offices, stations, machine-shops, machinery, implements, materials, and other property in possession of said plaintiffs under said first-mentioned contract, on the 1st day of April, A. D. 1868; and the said plaintiffs further say that afterwards, to wit, on the day and year last aforesaid, they did, in obedience to said notice so served upon them as aforesaid, and under the direction of the said The Millville and Glassboro' Railroad Company, surrender and give up possession of said railroad, roadway, superstructure, rolling-stock, buildings, machine-shops, machinery, offices, stations, implements, materials, and other property in their possession under said contract, unto the said defendant, to wit, in New Jersey, to wit, in the county aforesaid, whereby said contract became and was terminated; and although the said
14 The Millville and Glassboro' Railroad Company had in and by said first-mentioned contract covenanted with the said plaintiffs in effect to pay them the value of said contract at the time of such termination thereof, and pay them the loss and damage incurred by them by reason of such termination thereof, as by reference to the copy of said contract above set out will more fully and at large appear; and although by reason of the premises the said defendant had become liable and bound to keep the said covenant with the said plaintiffs, and had become liable and bound to pay to the said plaintiffs the value of said contract at the time of such termination thereof, and to pay them the loss and damage incurred by them and justly and equitably due to them by reason of such termination thereof; yet the said plaintiffs in fact say that the said defendant (although often requested so to do) hath not

kept said contract, but hath broken the same with the said plaintiffs, and hath hitherto wholly neglected and refused, and doth still neglect and refuse, to keep the same with the said plaintiffs, and (although often requested so to do) hath not paid to the said plaintiffs the value of said contract at the time of such termination thereof, as aforesaid, and hath not paid to the said plaintiffs the loss and damage incurred by them and justly and equitably due to them by reason of such termination of said contract as aforesaid; but so to do the said defendant hath hitherto wholly neglected and refused, and doth still neglect and refuse, to the damage of the said plaintiffs of five hundred thousand dollars.

And also, for that, whereas heretofore, to wit, on the 8th day of October, A. D. 1863, at New Jersey, to wit, in the county aforesaid, by a certain other contract of lease and agreement made and entered into by and between the said The Millville and Glassboro Railroad Company of the first part and the said plaintiffs of the second part, and one Richard D. Wood, for himself, his heirs, executors, and administrators of the third part, sealed with the respective seals of the parties thereto, and bearing date a certain day and year therein named, to wit, the day and year aforesaid, which said contract being in the possession and control of said defendant, the said plaintiffs cannot produce the same here to the court, the said The Millville and Glassboro Railroad Company demised and leased unto the said plaintiffs for the consideration in such contract mentioned all their roadway, superstructure, buildings, machine shops, offices, stations, rolling stock, machinery, implements, and materials on and along the line of said railroad (said railroad lying and being between the towns of Millville and Glassboro in the State of New Jersey, to wit, in the county aforesaid), for and during the term of twenty years from the first day of August, A. D. 1863, and thence next ensuing, and in and by said contract it was agreed by and between the said The Millville and Glassboro Railroad Company and the said plaintiffs, that the said The Millville and Glassboro Railroad Company should at any time have the right to put an end to said contract, and all the rights thereby given to the said plaintiffs, and to retake possession of the said railroad, roadway, rolling stock, and buildings, and other property in the possession of the said plaintiffs under said contract belonging and appurtenant thereto, upon three months' notice to that effect given to the said plaintiffs, or either of them, but upon termination of said contract, according to the notice thus provided for, the said The Millville and Glassboro Railroad Company covenanted and agreed in effect to pay to the said plaintiffs the value of said contract at the time of such termination thereof, and to pay them the loss and damages incurred by them, and justly and equitably due to them, the said plaintiffs, by reason of such termination of said contract.

And the said plaintiffs say that afterwards, to wit, on the day and year aforesaid, at New Jersey, to wit, in the county aforesaid, they took possession of said railroad, roadway, superstructure, buildings, machine shops, offices, stations, rolling stock, machinery, implements, and materials on and along the line of said railroad under said contract, and have performed, fulfilled, and kept all the covenants and agreements on their part to be performed, fulfilled, and kept, in and by said contract, from the time of the making of the same until the termination thereof by the said The Millville and Glassboro Railroad Company as hereinafter set forth.

And the said plaintiffs say that afterwards, to wit, on the 8th day of November, A. D. 1867, at New Jersey, to wit, in the county aforesaid, the said The Millville and Glassboro Railroad Company gave notice to

the said plaintiffs of the intention of said Millville and Glassboro Railroad Company to put an end to said contract and all the rights thereby given, and to retake possession of the said railroad, roadway, rolling stock, buildings, and other property and materials belonging and appurtenant thereto, on the 1st day of April, A. D. 1868.

15 And the said plaintiffs further say, that before the 1st day of April, A. D. 1868, to wit, on the 12th day of October, A. D. 1867, at New Jersey, to wit, in the county aforesaid, the said The Millville and Glassboro Railroad Company made an agreement with the West Jersey Railroad Company, the said defendant (also a corporation of the State of New Jersey), providing in effect, among other things, for the transfer, assignment, and merger of all their franchises, rights, and property to and into the said defendant corporation, which last mentioned agreement was afterwards confirmed by an act of the legislature of the State of New Jersey, approved the eighteenth day of March, A. D. 1868, entitled "An act to consolidate the railroad lines of West Jersey," which said act of the said legislature authorized the transfer of all the franchises, rights, and property of the said The Millville and Glassboro Railroad Company to the defendant corporation, and provided, among other things, that said defendant corporation should be liable for all debts, liabilities, and obligations of the said The Millville and Glassboro Railroad Company.

In pursuance of which last-mentioned agreement, and by authority of the said act of the said legislature, the said The Millville and Glassboro Railroad Company afterwards, to wit, on the first day of April, A. D. 1868, at New Jersey, to wit, in the county aforesaid, transferred and assigned all their franchises, rights, and property to and became merged with all their franchises, rights, and property in the said defendant corporation; and the said plaintiffs further say that afterwards, to wit, on the day and year last aforesaid, at New Jersey, to wit, in the county aforesaid, the said plaintiffs, in obedience to the notice given to them on the eighth day of November, as aforesaid, and in compliance with their covenant in that behalf, and by the direction of the said The Millville and Glassboro Railroad Company, surrendered and gave up possession of said Millville and Glassboro Railroad, roadway, superstructure, rolling stock, buildings, machinery, machine shops, offices, and stations, implements, materials, and other property in their possession under said contract, unto the said defendant corporation, whereby said contract became and was terminated; and although said Millville and Glassboro Railroad Company had covenanted with the said plaintiffs to pay them the value of said contract at the time of such termination thereof, and to pay them for the loss and damage incurred by them, and justly and equitably due to them by reason of such termination thereof, and the said defendant, by means of the premises, had become liable and bound to keep the said covenant with the said plaintiffs, yet the said plaintiffs, in fact, say that the said defendant (although often requested so to do) hath not kept said covenant with the said plaintiffs, but hath broken the same, and hath hitherto wholly neglected and refused, and doth still neglect and refuse, to keep the same with the said plaintiffs, and (although often requested so to do) hath not paid to the said plaintiffs the value of the said contract at the time of such termination thereof, as aforesaid, and hath not paid to the said plaintiffs the loss and damage incurred by them, and justly and equitably due to them by reason of such termination of said contract, as aforesaid; but to do so the defendant hath hitherto wholly neglected and refused, and doth still neglect

and refuse, to the damage of the said plaintiffs of five hundred thousand dollars, and therefore they bring this suit.

A. B. SHEARER,
Attorney for Plaintiffs.

(Endorsed:) 861. C. P., No. 1, September term, 1875. George W. Thomas et al. vs. The West Jersey R. R. Co. Narr. Filed December 8, 1875. Shearer.

16 In the court of common pleas, No. 1, for the city and county of Philadelphia, C. P., No. 1, Sept. T., 1875.

GEORGE W. THOMAS, ALFRED S. PORTER, AND Nathaniel F. Chew
vs.
THE WEST JERSEY RAILROAD COMPANY. } No. 861.

To the honorable the judges of said court:

The petition of the West Jersey Railroad Company, defendant in above suit, respectfully represents as follows:

1. That the said The West Jersey Railroad Company is defendant in above suit, and is a corporation created and existing under the laws of the State of New Jersey.

2. That the plaintiffs, George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, are citizens of the State of Pennsylvania.

3. That above suit has not been finally tried, but is now pending in above court.

17 4. That the amount in dispute in the above case exclusive of costs exceeds the sum of five hundred dollars.

5. That your petitioner desires to have above suit removed from the above court into the circuit court of the United States for the eastern district of Pennsylvania.

6. That the said The West Jersey Railroad Company is ready to give good and sufficient surety for the entering in the said circuit court of the United States on the first day of its session thereafter copies of the process against the said The West Jersey Railroad Company, and also of all pleadings and other proceedings so far had in your honorable court in said suit, and also to do such other appropriate acts as are required by the act of Congress entitled "An act for the removal of causes in certain cases from State courts," approved July 27th, 1866; and also by the act of Congress entitled "An act to amend an act entitled 'An act for the removal

18 of causes in certain cases from State courts,' approved July twenty-seventh, eighteen hundred and sixty-six," approved March 2, 1867.

Your petitioner therefore prays your honorable court to make an order for the removal of the said suit of George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew against the West Jersey Railroad Company to the circuit court of the United States for the eastern district of Pennsylvania, and that no further proceedings be had in said suit in your honorable court, and that such orders may be made in the premises as will enable your petitioner to avail itself of whatever benefit may accrue to it under and by virtue of the said acts of Congress and this petition.

And your petitioner will ever pray, &c.

[SEAL.] G. R. ROBERTS, *President.*

Attest:

W. TAYLOR, *Sec'ry.*

19 George B. Roberts, on behalf of the above-named petitioner, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true to the best of his knowledge, information, and belief.

G. B. ROBERTS.

Sworn and subscribed before me this twenty-first day of January, A. D. 1876.

[SEAL.] HENRY C. SPACKMAN,
Notary Public.

(Endorsed:) 861. Sept. T., 1875. C. P. No. 1. George W. Thomas et al. vs. The West Jersey Railroad Company. Petition for removal of cause to circuit court of the U. S. Filed January 22, 1876. Dickson.

20 In the court of common pleas No. 1, for the county of Philadelphia. Sept. T., 1875.

GEORGE W. THOMAS, ALFRED S. PORTER, AND Nathaniel F. Chew
vs.
THE WEST JERSEY RAILROAD COMPANY. } No. 861.

And now, to wit, January 22d, 1876, on motion of Samuel Dickson, for defendant, upon consideration of the petition of The West Jersey Railroad Company, the plaintiff having waived the right to demand security, it is ordered that the above cause, George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew against The West Jersey Railroad Company, numbered 861, of September term, 1875, be removed to the circuit court of the United States for the eastern district of Pennsylvania, and that no further proceedings be had in this court, in accordance with the provisions of the act of Congress entitled "An act for the removal of causes in certain cases from State courts," approved July 27th, 1866; and also of the act of Congress entitled "An act to amend
21 an act for the removal of causes in certain cases from State courts, approved July twenty-seventh, eighteen hundred and sixty-six," approved March 2, 1867.

(Endorsed:) 861. Sept. T., 1875. C. P. No. 1. Thomas et al. vs. West Jersey R. R. Co. Order of court for the removal of cause to circuit court of the United States for the eastern district of Pennsylvania. Filed Jan'y 22, 1876.

22 COMMONWEALTH OF PENNSYLVANIA,
Philadelphia County, ss:

I, William B. Mann, prothonotary of the court of common pleas No. one, in and for said county, certify that the foregoing is a full and correct copy of the whole record of the case herein stated, wherein George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew are plaintiffs, and The West Jersey Railroad Company is defendant, as the same remains of record before the said court, at No. 861, of September term, A. D. 1875.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court the fifth day of February, A. D. 1876.

[SEAL.] E. J. LINDSAY,
Pro Prothonotary.

23 And afterwards, to wit. on the 18th day of October, A. D. 1876, the defendant, by its attorney, comes into court here and files its plea, which, being read, is in the words following, to wit:

U. S. C. C., Oct. sess., 1875.

THOMAS
vs. No. 94.
WEST JERSEY RAILROAD COMPANY.

Defendants pleads non est factum, covenants performed absque hoc; covenants performed with leave to give the special matter in evidence.

S. DICKSON, per C.,
Att'y for Def't.

(Endorsed:) 94. Oct. sess., 1875. U. S. C. C. Thomas vs. West Jersey Railroad Company. Plea filed October 18, 1876. Dickson.

And afterwards, to wit, on the 17th day of March, A. D. 1877, the parties aforesaid, by their attorneys aforesaid, came into court here, and leave of the said court being first had and obtained, the plaintiff files an amendment to its declaration, which, being read, is in the words and figures following, to wit:

24 FIRST ADDITIONAL COUNT.

And also, for that whereas heretofore, to wit, on the 8th day of October, 1863, the Millville and Glassboro Railroad Company, a corporation duly incorporated under the laws of the State of New Jersey, did demise, lease, and to farm let unto the said plaintiffs all the roadway and superstructure of and belonging to the said railroad company, buildings, machine-shops, machinery, rolling-stock, implements, and materials of and belonging to the said railroad company, on and along the line of the said railroad company, during the term of twenty years, from the first day of August, A. D. 1863, and thence next ensuing, by a certain contract and agreement under the seals of the parties thereto, bearing date a certain day and year therein named, to wit, the day and year first aforesaid, and entered into by the Millville and Glassboro Railroad Company of the first part, and George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew of the second part, and Richard D. Wood of the third part, which contract it was lawful for the said company to make and enter into, both inasmuch as it was provided by the charter of the said Millville and Glassboro Railroad Company, the Pamphlet Laws of New Jersey, act of 9 March, 1859, that it should be lawful for said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation or individuals for transporting or conveying any kind of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts; and from other authority to the said corporation, contained in the said charter, it thereunto enabling, an authorized copy of which said charter and act of assembly, the date whereof is as follows, to wit, March 9th, 1859, the said plaintiffs here bring into court.

And whereas it was provided by the said contract, as is set forth in the first count of this declaration, which said contract and agreement being in the possession and control of the said defendant, the said plaintiffs cannot bring into court.

And whereas, under and by virtue of said contract, the said plaintiffs afterwards, to wit, on the day and year first aforesaid, in New Jersey, to wit, in the eastern district of Pennsylvania, aforesaid, entered upon and took possession of the said Millville and Glassboro Railroad, roadway and superstructure, buildings and machinery, shops, offices, stations, rolling-stock, implements, and materials on and along the line of the said railroad, and continued in the possession, use, and enjoyment thereof until the termination of the said contract by the Millville and Glassboro Railroad Company, to wit, until at or about the first day of April, A. D. 1868; and during said time, to wit, from the time of beginning of the said lease until the termination thereof as aforesaid, the said plaintiffs always well and truly performed, fulfilled, and kept all things in said contract covenanted on their part to be performed, fulfilled, and kept, and performed and fulfilled all duties imposed on them by the said contract, and performed and fulfilled all things necessary to be performed and fulfilled on their part to enable them to maintain this present action, and all conditions precedent to their right of recovery in this case.

And whereas, while the said plaintiffs were in the possession and enjoyment of the said The Millville and Glassboro Railroad Company, with its appurtenances as aforesaid, to wit, on the 8th day of November, A. D. 1867, the said The Millville and Glassboro Railroad Company, under and by virtue of a stipulation contained in the said agreement, notified the plaintiffs to surrender and give up possession of said Millville and Glassboro Railroad, superstructure, rolling-stock, buildings, offices, stations, machine-shops, machinery, implements, materials, and other property in possession of said plaintiffs under said agreement.

And whereas, prior to the said first day of April, A. D. 1868, to wit, on the 12th day of October, 1867, a certain other agreement, under seal, was entered into between the said Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, which latter corporation was incorporated by act of assembly of the State of New Jersey, by which said agreement it was inter alia provided that the said Millville and Glassboro Railroad Company should be consolidated with and merged into the said West Jersey Railroad Company, under the corporate title of the West Jersey Railroad Company, and for the transfer and assignment of all the property and effects of the said The Millville and Glassboro Railroad Company to the said the West Jersey Railroad Company, together will all the franchises, rights, and property of the said The Millville and Glassboro Railroad Company, which said agreement was afterwards, to wit, on the 18th day of March, A. D. 1868, confirmed and approved by an act of the legislature of the State of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," of the said last mentioned date, by which said act it was provided that the said the West Jersey Railroad Company should be liable for all the debts, liabilities, and obligations of the said The Millville and *and* Glassboro Railroad Company.

And whereas, in pursuance of the said agreement between the said The West Jersey Railroad Company and the said The Millville and Glassboro Railroad Company, and also by authority of and in compliance with the said last-mentioned act of the legislature of the State of New Jersey, the said The Millville and Glassboro Railroad Company, afterwards, to wit, on the first day of April, 1868, in New Jersey, to wit, in the eastern district of Pennsylvania, transferred and assigned all its railroad, superstructure, rolling-stock, buildings, stations, offices, machine shops, and all its other property to and become merged into and

consolidated with the said The West Jersey Railroad Company, together with all its franchises, rights, and property under and by virtue of the said agreement and transfer, and of the said last-mentioned act of assembly of the State of New Jersey.

And whereas, by the said last-mentioned act of assembly of the State of New Jersey, it was provided that the said agreement therefore entered into between the said companies, should be, by the said act, validated and confirmed, and the said companies to make said consolidation in the manner in and by said agreement between them provided.

And it was also provided in the said act that when such assignment and transfer of the corporate powers, franchises, and property of the Millville and Glassboro Railroad Company, as was provided for in said agreement between the said railroad companies, should be made, the same should be valid and effectual to convey and transfer the said powers, franchises, and property to, and vest them in the West Jersey Railroad Company, subject, however, to all the debts, liabilities, and obligations of both of said companies.

And whereas, the said plaintiffs did comply with the terms of the said notice to them by the said The Millville and Glassboro' Railroad Company, and did surrender, and give up, and transfer the possession of the said railroad, roadway, superstructure, rolling-stock, buildings, machine shops, machinery, offices, stations, implements, materials, and other property in their possession under the said contract, unto the said defendant, the West Jersey Railroad Company in New Jersey, to wit, in the eastern district of Pennsylvania aforesaid.

And whereas, by the said agreement between the plaintiffs and
26 the said The Millville and Glassboro' Railroad Company, it was provided that upon the termination of the said contract between the plaintiffs and the Millville and Glassboro' Railroad Company, by notice as aforesaid, if the plaintiffs should so desire, then the Millville and Glassboro' Railroad Company should and would appoint a competent and disinterested person, who, together with another competent and disinterested person appointed by the plaintiffs, should consider and decide upon the value of the said contract to the plaintiffs, and the loss and damage incurred by and justly and equitably due to them by reason of such termination thereof, and in the event of any difference between the persons so appointed as aforesaid, as to the amount of damage justly and equitably due to the plaintiffs, as aforesaid, then, and in such case, the said two persons should be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third should be chosen, should be final, conclusive, and binding upon the parties to the said agreement.

And whereas, the said plaintiffs did desire and request the said defendant, who had, as aforesaid, become liable to the performance of the said contract entered into by the said The Millville and Glassboro' Railroad Company, with the said plaintiffs, to appoint a competent and disinterested person in accordance with the provisions of the said contract, who together with another competent and disinterested person appointed by the plaintiffs, should consider and decide upon the value of the said contract to the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them by reason of such termination thereof.

Yet the said plaintiffs in fact say, that the said defendant, although often requested so to do, have not kept their said contract and covenants therein contained, but have broken the same with the said plaint-

iffs, and have hithereto neglected and refused, and do still neglect and refuse to keep the same with the said plaintiffs, and although often requested so to do, have refused, and still do refuse to appoint an arbitrator as provided by the said agreement, or to enter into the reference and arbitration provided for in the said contract between the said plaintiffs and the said The Millville and Glassboro' Railroad Company, whereby and by reason of which refusal and neglect to perform the said agreement by the said defendant, the said plaintiffs have been damaged to the extent of five hundred thousand dollars.

SECOND ADDITIONAL COUNT.

And also, for that whereas, heretofore, to wit, on the 8th day of October, 1863, the Millville and Glassboro' Railroad Company, a corporation duly incorporated under the laws of the State of New Jersey, did demise, lease, and to farm let unto the said plaintiffs all the roadway and superstructure of and belonging to the said railroad company, buildings, machine shops, machinery, rolling stock, implements, and materials of and belonging to the said railroad company on and along the line of the said railroad company during the term of twenty years, from the first day of August, A. D. 1863, and thence next ensuing, by a certain contract and agreement under the seals of the parties thereto, bearing date a certain day and year therein named, to wit, the day and year first aforesaid, and entered into by the Millville and Glassboro' Railroad Company of the first part, and George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew of the second part, and Richard D. Wood of the third part, which contract it was lawful for the said company to make and enter into, both inasmuch as it was provided by the charter of the said Millville and Glassboro' Railroad Company (pam-
27 phlet laws of New Jersey, act of 9 March, 1859) that it shoud be lawful for said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation or individuals for transporting or conveying any kind of goods, produce, merchandise, freight or passengers, and to enforce the fulfilment of such contracts; and from other authority to the said corporation, contained in the said charter, it thereunto enabling, an authorized copy of which said charter and act of assembly, the date whereof is as follows, to wit, March 9th, 1859, the said plaintiffs here bring into court; and whereas, it was provided by the said contract, as is set forth in the first count of this declaration; which said contract and agreement being in the possession and control of the said defendant, the said plaintiffs cannot bring into court.

And whereas under and by virtue of said contract the said plaintiffs afterwards, to wit, on the day and year first aforesaid, in New Jersey, to wit, in the eastern district of Pennsylvania aforesaid, entered upon and took possession of the said Millville and Glassboro' Railroad, roadway, and superstructure, buildings and machinery, shops, offices, stations, rolling stock, implements, and materials on and along the line of the said railroad, and continued in the possession, use, and enjoyment thereof until the termination of the said contract by the Millville and Glassboro' Railroad Company, to wit, until at or about the first day of April, A. D. 1868, and during said time, to wit, from the time of beginning of the said lease until the termination thereof as aforesaid, the said plaintiffs always well and truly performed, fulfilled, and kept all things in said contract covenanted on their part to be performed, fulfilled, and kept, and performed and fulfilled all duties imposed on them by the said con-

tract, and performed and fulfilled all things necessary to be performed and fulfilled on their part to enable them to maintain this present action and all conditions precedent to their right of recovery in this case;

And whereas, while the said plaintiffs were in the possession and enjoyment of the said The Millville and Glassboro' Railroad Company, with its appurtenances as aforesaid, to wit, on the 8th day of November, A. D. 1867, the said The Millville and Glassboro' Railroad Company, under and by virtue of a stipulation contained in the said agreement, notified the plaintiffs to surrender and give up possession of said Millville and Glassboro' Railroad, superstructure, rolling stock, buildings, offices, stations, machine shops, machinery, implements, materials, and other property in possession of said plaintiffs under said agreement;

And whereas, prior to the said first day of April, A. D. 1868, to wit, on the 12th day of October, 1867, a certain other agreement under seal was entered into between the said Millville and Glassboro' Railroad Company and the West Jersey Railroad Company, the defendant, which latter corporation was incorporated by act of assembly of the State of New Jersey, by which said agreement it was inter alia provided that the said Millville and Glassboro' Railroad Company should be consolidated with and merged into the said West Jersey Railroad Company, under the corporate title of the West Jersey Railroad Company, and for the transfer and assignment of all the property and effects of the said The Millville and Glassboro' Railroad Company to the said The West Jersey Railroad Company, together with all the franchises, rights, and property of the said The Millville and Glassboro Railroad Company, which said agreement was afterwards, to wit, on the 18th day of March, A. D. 1868, confirmed and approved by an act of the legislature of the State of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," of the said last mentioned date, by which said act it was provided that the said The West Jersey Railroad Company
should be liable for all the debts, liabilities, and obligations of
28 the said The Millville and Glassboro Railroad Company;

And whereas, in pursuance of the said agreement between the said The West Jersey Railroad Company and the said The Millville and Glassboro Railroad Company, and also by authority of and in compliance with the said last-mentioned act of the legislature of the State of New Jersey, the said The Millville and Glassboro Railroad Company afterwards, to wit, on the first day of April, 1868, in New Jersey, to wit, in the eastern district of Pennsylvania, transferred and assigned all its railroad, superstructure, rolling stock, buildings, stations, officers, machine shops, and all its other property to and became merged into and consolidated with the said The West Jersey Railroad Company, together with all its franchises, rights, and property, under and by virtue of the said agreement and transfer, and of the said last-mentioned act of assembly of the State of New Jersey;

And whereas, by the said last-mentioned act of assembly of the State of New Jersey, it was provided that the said agreement theretofore entered into between the said companies should be, by the said act, validated and confirmed, and the said companies to make such consolidation in the manner in and by said agreement between them provided. And it was also provided in the said act that when such assignment and transfer of the corporate powers, franchises, and property of the Millville and Glassboro Railroad Company, as was provided for in said agreement between the said railroad companies should be made, the same should be valid and effectual to convey and transfer the said

powers, franchises, and property to, and vest them in the West Jersey Railroad Company, subject, however, to all the debts, liabilities, and obligations of both of said companies; and whereas the said plaintiffs did comply with the terms of the said notice to them by the said The Millville and Glassboro' Railroad Company, and did surrender, and give up, and transfer the possession of the said railroad, roadway, superstructure, rolling stock, buildings, machine shops, machinery, offices, stations, implements, materials, and other property in their possession under the said contract unto the said defendant, the West Jersey Railroad Company in New Jersey, to wit, in the eastern district of Pennsylvania aforesaid; and whereas, by the said agreement between the plaintiffs and the said The Millville and Glassboro' Railroad Company, it was provided that upon the termination of the said contract between the plaintiffs and the Millville and Glassboro' Railroad Company, by notice as aforesaid, if the plaintiffs should so desire, then the Millville and Glassboro' Railroad Company should, and would, appoint a competent and disinterested person, who, together with another competent and disinterested person appointed by the plaintiffs, should consider and decide upon the value of the said contract to the plaintiffs, and the loss and damage incurred by and justly and equitably due to them by reason of such termination thereof, and in the event of any difference between the persons so appointed as aforesaid as to the amount of damage justly and equitably due to the plaintiffs as aforesaid, then, and in such case, the said two persons should be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third should be chosen, should be final, conclusive, and binding upon the parties to the said agreement;

And whereas the said plaintiffs did desire and request the said defendant, who had, as aforesaid, become liable to the performance of the said contract entered into by the said The Millville and Glassboro' Railroad Company with the said plaintiffs, to appoint a competent and disinterested person in accordance with the provisions of the said contract, who, together with another competent and disinterested person appointed by the plaintiffs, should consider and decide upon the
29 value of the said contract to the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them by reason of such termination thereof:

Yet the said plaintiffs in fact say, that the said defendant, although often requested so to do, have not kept their said contract and covenants therein contained, but have broken the same with the said plaintiffs, and have hitherto neglected and refused, and do still neglect and refuse to keep the same with the said plaintiffs, and although often requested so to do, have refused, and still do refuse to appoint an arbitrator as provided by the said agreement, or to enter into any arbitration, unless a reference were agreed to by the said plaintiffs, other and different from the one provided in the said agreement, whereby and by reason of which refusal and neglect to perform the said agreement by the said defendant, the said plaintiffs have been damaged to the extent of five hundred thousand dollars.

THIRD ADDITIONAL COUNT.

And also, for that whereas heretofore, to wit, on the 8th day of October, 1863, the Millville and Glassboro Railroad Company, a corporation duly incorporated under the laws of the State of New Jersey, did de-

mise, lease, and to farm-let unto the said plaintiffs, all the roadway and superstructure of and belonging to the said railroad company, buildings, machine-shops, machinery, rolling stock, implements and materials of and belonging to the said railroad company, on and along the line of the said railroad company, during the term of twenty years, from the first day of August, A. D. 1863, and thence next ensuing, by a certain contract and agreement, under the seals of the parties thereto, bearing date a certain day and year therein named, to wit, the day and the year first aforesaid, and entered into by the Millville and Glassboro Railroad Company of the first part, and George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of the second part, and Richard D. Wood, of the third part, which contract it was lawful for the said company to make, and enter into both, inasmuch as it was provided by the charter of the said Millville and Glassboro Railroad Company, (act of 9 March, 1859, pamphlet laws of New Jersey, of the year 1859,) that it should be lawful for the said company at any time during the continuance of the charter, to make contracts and engagements with any other corporation or individuals for transporting or conveying any kind of goods, produce, merchandise, freight or passengers, and to enforce the fulfilment of such contracts, and from other authority to the said corporation, in the said charter contained, it thereunto enabling: an authorized copy of which said charter and act of assembly, the date whereof is as follows, to wit, March 9th, 1859, the said plaintiffs here bring into court; and whereas it was provided by the said contract, as is fully set forth in the first count of this declaration; which said contract and agreement, being in the possession and control of the said defendant, the said plaintiffs cannot bring here into court.

And whereas, under and by virtue of the said contract, the said plaintiffs afterwards, in New Jersey, to wit, in the eastern district of Pennsylvania, aforesaid, entered upon, and took possession of the said Millville and Glassboro Railroad, roadway and superstructure, buildings, and machinery, shops, offices, stations, rolling stock, implements and materials on and along the line of the said railroad, and continued in the possession, use and enjoyment thereof, until the termination of the said contract by the Millville and Glassboro Railroad Company, to wit, until at or about the first day of April, A. D. 1868, and during said time, to wit, from the time of the beginning of the said lease, until
30 the termination thereof, as aforesaid, the said plaintiffs always well and truly performed, fulfilled and kept all things in the said contract covenanted on their part to be performed, fulfilled and kept, and performed and fulfilled all duties imposed on them by the said contract; and performed and fulfilled all things necessary to be performed and fullfilled for the maintenance by them of this suit, and all conditions precedent to their right of recovery in this case.

And whereas while the said plaintiffs were in the possession and enjoyment of the said The Millville and Glassboro Railroad Company, with its appurtenances, as aforesaid, to wit, on the 8th day of December, A. D. 1867, the said The Millville and Glassboro Railroad Company, under and by virtue of a stipulation contained in the said agreement, notified the plaintiffs to surrender and give up possession of the said The Millville and Glassboro Railroad, superstructure, rolling stock, buildings, offices, stations, machine shops, machinery, implements, materials, and other property in possession of the said plaintiffs, under the said agreement.

And whereas, prior to the said first day of April, A. D. 1868, to wit, on the 12th day of October, 1867, a certain other agreement, under seal,

was entered into between the said Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, which latter corporation was incorporated by act of assembly of the State of New Jersey, by which said agreement it was, inter alia, provided that the said Millville and Glassboro Railroad Company should be consolidated with and merged into the said West Jersey Railroad Company under the corporate title of the West Jersey Railroad Company; and for the transfer and assignment of all the property and effects of the said The Millville and Glassboro Railroad Company to the said The West Jersey Railroad Company, together with all the franchises, rights, and property of the said The Millville and Glassboro Railroad Company, which said agreement was afterwards, to wit, on the 18th day of March, A. D. 1858, confirmed and approved by an act of the legislature of the State of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," of the said last-mentioned date, by which said act it was provided that the said The West Jersey Railroad Company should be liable for all the debts, liabilities, and obligations of the said The Millville and Glassboro Railroad Company.

And whereas, in pursuance of the said agreement between the said West Jersey Railroad Company and the said Millville and Glassboro Railroad Company, and also by authority of, and in compliance with the said last-mentioned act of the legislature of the State of New Jersey, the said The Millville and Glassboro Railroad Company afterwards, to wit, on the first day of April, 1868, in New Jersey, to wit, in the eastern district of Pennsylvania, transferred and assigned all its railroad, superstructure, rolling stock, buildings, stations, offices, machine shops, and all its other property to, and became merged into and consolidated with the said The West Jersey Railroad Company, together with all its franchises, rights, and property, under and by virtue of the said agreement and transfer, and of the said last-mentioned act of assembly of the State of New Jersey.

And whereas by the said last-mentioned act of assembly of the State of New Jersey, it was provided that the said agreement theretofore entered into between the said companies should be, by the said act, validated and confirmed, and the said companies to make said consolidation in the manner in and by said agreement between them provided, and it was also provided in the said act that when such assignment and transfer of the corporate powers, franchises, and property of the Millville and Glassboro Railroad Company, as provided in said agreement between the railroad companies, should be made, the same should be valid and effectual to convey and transfer the said powers, fran-
31 chises, and property to, and vest them in the West Jersey Railroad Company, subject, however, to all the debts, liabilities, and obligations of both the said companies; and whereas the said plaintiffs did comply with the terms of the said notice to them by the said The Millville and Glassboro Railroad Company, and did surrender and give up, and transfer the possession of the said railroad, roadway, superstructure, rolling-stock, buildings, machine shops, machinery, offices, stations, implements, materials, and other property in their possession, under the said contract, unto the said defendant, the West Jersey Railroad Company, in New Jersey, to wit, in the eastern district of Pennsylvania, aforesaid.

And whereas, by the said agreement between the plaintiffs and the said The Millville and Glassboro Railroad Company, it was provided that upon the termination of the said contract between the plaintiffs and the Millville and Glassboro Railroad Company, by notice, as aforesaid,

the Millville and Glassboro Railroad Company should pay to the said plaintiffs the value of the said contract of the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them by reason of such termination thereof, and also agreed that if at the termination of the said contract, by notice, as aforesaid, if the plaintiffs should so desire, then the Millville and Glassboro Railroad Company should and would appoint a competent and disinterested person, who together with another competent and disinterested person appointed by the plaintiffs, should consider and decide upon the value of the said contract to the plaintiffs and the loss and damage incurred by, and justly and equitably due to them by reason of such determination thereof; and in the event of any difference between the persons so appointed, as aforesaid, as to the amount of damage justly and equitably due to the plaintiffs, as aforesaid, then, and in such case, the said two persons should be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third should be chosen, should be final, conclusive, and binding upon the parties to the said agreement, and the said plaintiffs say that although persons were appointed in accordance with the terms of the said contract, as modified by the subsequent agreement of the parties thereto, and an award by them made according to the said contract and the said agreement between the said parties, yet the said defendants had the said award set aside, whereby and by reason of the premises, the said defendants became liable, upon their covenants aforesaid, to pay to the said plaintiffs the value of the said contract of the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them, by reason of the termination thereof, as aforesaid, whereby, and by reason of which refusal and neglect to perform the said agreement by the said defendants, the said plaintiffs have been damaged to the extent of five hundred thousand dollars.

FOURTH ADDITIONAL COUNT.

And also, for that whereas heretofore, to wit, on the 8th day of October, 1863, the Millville and Glassboro Railroad Company, a corporation duly incorporated under the laws of the State of New Jersey, did demise, lease, and to farm let unto the said plaintiffs all the roadway and superstructure of and belonging to the said railroad company, buildings, machine-shops, machinery, rolling stock, implements, and materials of and belonging to the said railroad company, on and along the line of the said railroad company, during the term of twenty years, from the first day of August, A. D. 1863, and thence next ensuing, by a certain contract and agreement, under the seals of the parties thereto, bearing date a certain day and year therein named, to wit, the day and
32 the year first aforesaid, and entered into by the Millville and Glassboro Railroad Company of the first part, and George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of the second part, and Richard D. Wood, of the third part, which contract it was lawful for the said company to make, and enter into both, inasmuch as it was provided by the charter of the said Millville and Glassboro Railroad Company (act of 9 March, 1859, Pamphlet Laws of New Jersey of the year 1859) that it should be lawful for the said company at any time during the continuance of the charter to make contracts and engagements with any other corporation or individuals for transporting or conveying any kind of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts, and from other authority to the said cor-

poration, in the said charter contained, it thereunto enabling; an authorized copy of which said charter and act of assembly, the date whereof is as follows, to wit, March 9th, 1859, the said plaintiffs here bring into court; and whereas it was provided by the said contract as is fully set forth in the first count of this declaration, which said contract and agreement being in the possession and control of the said defendant, the said plaintiffs cannot here bring into court.

And whereas, under and by virtue of the said contract, the said plaintiff afterwards, in New Jersey, to wit, in the eastern district of Pennsylvania, aforesaid, entered upon and took possession of the said Millville and Glassboro' Railroad, roadway and superstructure, buildings and machinery, shops, offices, stations, rolling-stock, implements, and materials, on and along the line of the said railroad, and continued in the possession, use, and enjoyment thereof, until the termination of the said contract by the Millville and Glassboro Railroad Company, to wit, until at or about the first day of April, A. D. 1868, and during said time, to wit, from the time of the beginning of the said lease until the termination thereof, as aforesaid, the said plaintiffs always well and truly performed, fulfilled, and kept all things in the said contract covenanted on their part to be performed, fulfilled, and kept, and performed and fulfilled all duties imposed on them by the said contract; and performed and fulfilled all things necessary to be performed and fulfilled for the maintenance by them of this suit, and all conditions precedent to their right of recovery in this case.

And whereas while the said plaintiffs were in the possession and enjoyment of the said The Millville and Glassboro Railroad Company with its appurtenances as aforesaid, to wit, on the 8th day of November, A. D. 1867, the said The Millville and Glassboro Railroad Company, under and by virtue of a stipulation contained in the said agreement, notified the plaintiffs to surrender and give up possession of the said The Millville and Glassboro Railroad, superstructure, rolling-stock, buildings, offices, stations, machine-shops, machinery, implements, materials and other property in possession of the said plaintiffs under the said agreement,

And whereas prior to the said first day of April, A. D. 1868, to wit, on the 12th day of October, 1867, a certain other agreement, under seal, was entered into between the said Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, which latter corporation was incorporated by act of assembly of the State of New Jersey, by which said agreement it was inter alia provided that the said Millville and Glassboro Railroad Company should be consolidated with and merged into the said West Jersey Railroad Company under the corporate title of the West Jersey Railroad Company; and for the transfer and assignment of all the property and effects of the said The Millville and Glassboro Railroad Company to the said The West Jersey Railroad Company, together with all the franchises, rights, and property of the said The Millville and Glassboro Railroad Company,

33 which said agreement was afterwards, to wit, on the 18th day of March, A. D. 1858, confirmed and approved by an act of the legislature of the State of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," of the said last mentioned date, by which said act it was provided that the said The West Jersey Railroad Company should be liable for all the debts, liabilities, and obligations of the said The Millville and Glassboro Railroad Company.

And whereas, in pursuance of the said agreement between the said West Jersey Railroad Company and the said The Millville and Glassboro Railroad Company, and also by authority of, and in compliance

with the said last mentioned act of the legislature of the State of New Jersey, the said The Millville and Glassboro Railroad Company afterwards, to wit, on the first day of April, 1868, in New Jersey, to wit, in the eastern district of Pennsylvania, transferred and assigned all its railroad, superstructure, rolling stock, buildings, stations, offices, machine shops, and all its other property to, and became merged into, and consolidated with the said The West Jersey Railroad Company, together with all its franchises, rights, and property, under and by virtue of the said agreement and transfer, and of the said last mentioned act of assembly of the State of New Jersey.

And whereas by the said last mentioned act of assembly of the State of New Jersey, it was provided that the said agreement theretofore entered into between the said companies, should be, by the said act, validated and confirmed, and the said companies to make said consolidation in the manner in and by said agreement between them provided, and it is also provided in the said act that when such assignment and transfer of the corporate powers, franchises, and property of the Millville and Glassboro Railroad Company, as provided in said agreement, between the railroad companies should be made, the same should be valid and effectual to convey and transfer the said powers, franchises, and property to, and vest them in the West Jersey Railroad Company, subject, however, to all the debts, liabilities, and obligations of both the said companies.

And whereas, the said plaintiffs did comply with the terms of the said notice to them by the said The Millville and Glassboro Railroad Company, and did surrender, and give up, and transfer the possession of the said railroad, roadway, superstructure, rolling stock, buildings, machine shops, machinery, offices, stations, implements, materials, and other property in their possession, under the said contract, unto the said defendant, the West Jersey Railroad Company, in New Jersey, to wit, in the eastern district of Pennsylvania, aforesaid.

And whereas, by the said agreement between the plaintiffs and the said The Millville and Glassboro Railroad Company, it was provided that upon the termination of the said contract between the plaintiffs and the Millville and Glassboro Railroad Company, by notice, as aforesaid, the Millville and Glassboro Railroad Company should pay to the said plaintiffs the value of the said contract of the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them by reason of such termination thereof, and also agreed that if at the termination of the said contract, by notice, as aforesaid, if the plaintiffs should so desire, then the Millville and Glassboro Railroad Company should and would appoint a competent and disinterested person, who together with another competent and disinterested person appointed by the plaintiffs, should consider and decide upon the value of the said contract to the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them by reason of such termination thereof; and in the event of any difference between the persons so appointed, as aforesaid, as to the amount of damage justly and equitably due to the plaintiffs, as aforesaid, then, and in such case, the said two persons should be at liberty to choose a third competent and disinterested
34 person, and the decision of said two persons, or of a majority of said three persons, if a third should be chosen, should be final, conclusive, and binding upon the parties to the said agreement, and the said plaintiffs say that although persons were appointed in accordance with the terms of the said contract, as modified by the subsequent agreement of the parties thereto, and an award by them made, yet that their

said award was set aside by the court of chancery of New Jersey, having jurisdiction in the premises; whereby, and by reason of the premises, the said defendant became liable upon their covenants aforesaid, to pay to the said plaintiffs the value of the said contract of the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them, by reason of the termination thereof, as aforesaid, whereby, and by reason of which refusal and neglect to perform the said agreement by the said defendants, the said plaintiffs have been damaged to the extent of five hundred thousand dollars.

P. L. VOORHEES,
GEORGE W. BIDDLE,
For the Plaintiffs.

(Endorsed:) No. 94. October, 1875. C. C. U. S. E. D. of Pa. George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, vs. The West Jersey Railroad Co. Amendment to declaration heretofore filed in this case. Amendment allowed March 17th, 1877. Filed March 17, 1877. Peter L. Voorhees, George W. Biddle, for plaintiffs.

35 And afterwards, to wit, on the 11th day of April, A. D. 1877, a jury being called came, to wit:

1. Henry R. Gummey.
2. William B. Ahern.
3. Roderick Prevost.
4. Herman A. Chambers.
5. William A. Fink.
6. Zachariah Simson.
7. Jacob H. Beam.
8. Joseph Bosler.
9. Thomas J. Timmons.
10. Patrick McManus.
11. Aaron Greenwald.
12. Joseph W. Clark.

who are respectively sworn or affirmed to try the issues joined, &c.

And afterwards, to wit, on the 13th day of April, A. D. 1877, the jurors aforesaid, on their oaths or affirmations aforesaid, respectively do say that they find for the defendant:

And afterwards, to wit, on the 16th day of April, A. D. 1877, the plaintiffs by their attorneys file the following bill of exceptions, to wit:

36 Be it remembered, That in October sessions, A. D. 1875, came George W. Thomas, Nathaniel T. Chew and Alfred S. Porter into the circuit court of the United States for the eastern district of Pennsylvania, and impleaded the West Jersey *Rail* Railroad Company in a certain plea of breach of covenant, &c., in which the said plaintiffs declared (prout narr) and the said defendants pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the Honorable W. McKennan and the Honorable John Cadwalader, judges of the said circuit court of the United States aforesaid, on Wednesday, the eleventh day of April, A. D. 1877, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impannelled (prout list of jurors), at which day came as well the said plaintiffs as the said defendant by their respective attorneys; and the jurors of the jury aforesaid, impannelled to try the said issues, being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial, the counsel of the said plaintiffs, to sustain the issue on their part, offer in evidence:

37 1. The contract and agreement between the Millville & Glass-

boro' R. R. Co. and George W. Thomas and others, plaintiffs, dated the 8th October, 1863 (prout same).

2. The acts of assembly of the State of New Jersey, one of them entitled an act to incorporate the Millville & Glassboro' Railroad Company, approved the ninth day of March, 1859, and another of them an act entitled a supplement to the act entitled an act to incorporate the Millville & Glassboro Railroad Company, approved the tenth day of April, 1867, and the acts referred to therein (prout the same); and also the fact that it was well known at the date of the last named act that the plaintiffs were lessees acting under the said contract and agreement, together with all other acts of the legislature of the State of New Jersey relating to the West Jersey Railroad Company and to the Millville and Glassboro Railroad Company (prout the same).

3. That George W. Thomas and others, the parties of the second part in the aforementioned agreement, dated October 8th, 1863, had performed the duties imposed upon them by the terms of the said agreement until the first day of April, 1868, at which last named date they ceased to act under the said agreement, in consequence of a notice
38 given to them by the parties of the first part under the terms of said agreement in the previous month of November, 1867.

Whereupon the counsel of the defendants objected to the said contract and agreement being received in evidence, because the said agreement was illegal and void, being beyond the powers and rights of the party of the first part thereto to make and enter into.

Whereupon after argument the court excluded and refused to permit the said agreement to be read in evidence, being of opinion that the same could not have been legally entered into and made by the party of the first part thereto, the Millville and Glassboro Railroad Company, the same being beyond their power to make and execute.

And thereupon the counsel of the said plaintiffs excepted to the said ruling and decision of the said court, and requested the said court to seal a bill of exceptions to the said ruling and decision, which is accordingly done.

[SEAL.] (Signed) W. McKENNAN,
Cir. J.

The plaintiffs offer in evidence the notice given by the Millville and Glassboro' Railroad Company to the plaintiffs without date; and
39 to prove that the said notice (prout same) was received by the plaintiffs on or about the eighth day of November, 1867, and that in pursuance thereof the plaintiffs delivered up possession of the property mentioned in said notice and fully complied with the terms of the same.

Objected to by defendants as irrelevant, and only competent as tending to prove the performance of an agreement already excluded by the court as illegal and void.

Whereupon the court sustained the said objection, and excluded the said offer of evidence; and thereupon the plaintiff's counsel excepted to the said ruling, and the court then there sealed a bill of exceptions thereto.

[SEAL.] (Signed) W. McKENNAN,
Cir. J.

The plaintiffs thereupon offered in evidence an act of the legislature of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," approved March 18th, 1868 (prout same); also, agreement dated

12th October, 1867, between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company (prout same); also,
40 deed dated April 1st, 1868, from Millville and Glassboro Railroad Company to West Jersey Railroad Company (prout same); also, to prove the consents of stockholders of both companies, as provided by said act of the legislature of New Jersey of March 18th, 1868 (prout same); also, notice from plaintiffs to Thomas H. Whitney, president of the said Millville and Glassboro Railroad Company, dated April 13th, 1868 (prout same); also, to prove that the said paper was delivered to said Whitney on the said last-mentioned day; also, to show that said Whitney, on or about the said last-mentioned day, delivered the said notice to Thomas J. Yorke, then president of the West Jersey Railroad Company; also, a notice of the said plaintiffs to the said Millville and Glassboro Railroad Company, dated May 22, 1868 (prout same); and to show that the same was delivered by the plaintiffs to the said West Jersey Railroad Company on or about the said last-mentioned day; also, to prove that the said West Jersey Railroad Company refused to comply with the terms of either of the said notices of April 13th, 1868, and May 22nd, 1868; also, a certain submission arbitration and award in proceedings between the plaintiffs and defendants (prout the same); also, proceedings in the court of chancery of New Jersey between the present plaintiffs
41 and defendants (prout the same); and the judgments and decrees of the courts thereunder (prout the same).

And the plaintiffs thereupon offered to prove the performance by them, and each of them, of all the things they and each of them were bound to perform under the said agreement of October 8th, 1863, and the value of the said contract to them, and the loss and damage incurred by and justly and equitably due to them, by reason of the termination of the said contract, under the seventeenth section thereof, as hereinbefore set forth, under the said notice served November 8th, 1867, as aforesaid.

The defendants object to the said testimony now offered by the plaintiffs as incompetent and irrelevant.

Whereupon the court refuse to admit in evidence each and every item thereof as offered by the said plaintiffs, and exclude the same from the consideration of the jury; whereupon the plaintiffs except to the said rulings and decisions of the said court, and request the court to seal bills of exception thereto, which is done accordingly.

[SEAL.] (Signed) W. McKENNAN,
Cir. J.

Whereupon the court charge the jury that their verdict must
42 be for the defendants; to which charge and opinion of the court the said plaintiffs did then and there except, and requested the court to seal a bill of exceptions thereto; which is done accordingly.

[SEAL.] (Signed) W. McKENNAN,
Cir. J.

And the jury then and there found a verdict for the defendants.

And thereupon the counsel for the said plaintiffs did then and there except to the aforesaid charge and opinion of the said court; and, inasmuch as the said charge and opinion, so excepted to, do not appear upon the record—

The said counsel for the said plaintiffs did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereupon the aforesaid judge, at the request of the said counsel for the plaintiffs, did put their seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this sixteenth day of April, A. D. 1877.

43 Contract and agreement made and entered into the eighth day of October, A. D. 1863, between the Millville and Glassboro Railroad Company of the first part, and George W. Thomas, Alfred S. Porter, and N. Frank Chew, of Millville, New Jersey, of the second part, and Richard D. Wood, of Philadelphia, and his heirs, executors, and administrators, of the third part.

Whereas, at a meeting of the stockholders of the Millville and Glassboro Railroad Company, held at Millville the fourteenth day of July, A. D. 1863, it was proposed to lease the railroad, and it was then judged best to refer the same to the next meeting of the board of directors, with power to act; and at the next meeting of that board, held on the same day and at the same place, the following resolution was offered, to wit:

"Resolved, That Thomas H. Whitney, Ferdinand F. Sharp, and Richard D. Wood be appointed as an executive committee to conduct the general business of this company, and that they be empowered to lease the road in perpetuity or for one or more years, as they may deem best for the interest of the concern, taking proper care to contract with responsible lessees"—

On motion, it was resolved to amend the above resolution, so that any contract made by the therein-named executive committee should be submitted to the directors and be by them approved before said contract should be binding upon this company. On motion, the above resolution as amended was adopted.

And whereas, in pursuance of this authority and of all other authority them in that behalf enabling, the party of the first part is desirous to contract for the transportation of freight, mails, and passengers over their railroad, and the party of the second part has proposed to them to undertake the same, upon the terms and as hereinafter mentioned, and to furnish all the necessary rolling stock, labor and materials, and also to perform and fulfill all and singular the duties and obligations hereinafter mentioned and assumed, which proposition the party of the first part has agreed to accept, upon the conditions and provisions hereinafter contained on the part of, and by the party of the second part to be observed and kept:

First. Now this contract and agreement witnesseth, that the party of the first part does hereby, and for the purpose of enabling the party of the second part to fulfill this contract, entrust to their possession and care, and subject to the provisions of this contract, all the roadway and superstructure, buildings, machine-shops, offices, stations, rolling stock, machinery, implements, and materials on and along the line of said railroad, of which a schedule is hereto annexed, marked "A." And the party of the second part hereby acknowledges the receipt of the said property for the purposes aforesaid, and the said property has been duly valued and appraised, and it is agreed that the valuation affixed to each article thereof in the said schedule is the just and true value thereof on the first day of August, A. D. 1863, being the time of the delivery of the property therein described to the party of the second part.

Second. That the party of the second part shall and will provide all the needful cars and engines for transporting, and will duly transport

all passengers, mails and freight, whether through or local, offering or delivered to them to be transported, and shall and will fulfill all the duties and liabilities of the party of the first part to the public.

44 Third. That the party of the second part shall and will, at their own cost, maintain the roadway or superstructure of the said railroad and the rolling stock thereof in their present good working condition; and shall and will, at their own cost, defray all the expenses and charges of running said railroad, and the expenses of all current renewals or repairs; and shall and will, in pursuance of these provisions, keep and pay all needful and prudent persons for performing the labor necessary to fulfill their obligations as herein expressed; and shall and will furnish, at their own expense, all necessary materials, including fuel, oil, tallow, and waste, and pay all water rents; and the party of the second part shall and will at all times indemnify and save harmless the party of the first part and their property for, from, and against all loss, outlay, and cost and damage for or by reason of any labor or material already or at any time hereafter so done or furnished, and from and against the claim of any person or persons therefor.

Fourth. And the party of the second part does hereby assume and take upon themselves all loss, cost, and damage of every nature, which may result to persons or property by reason of any matter or thing connected with this contract, and done or omitted by them thereunder; but not for any loss, cost, or damage incurred by act of God or by act of the public enemies.

Fifth. That the party of the second part shall and will, at their own expense, forthwith effect full and sufficient insurances, in the name of the party of the first part and for their interest, against damage or loss by fire, upon the station-house at Millville and the engine-houses at the same place, and the engine-house at Glassboro', and shall and will keep the same insured during the continuance of this contract, or until the said buildings shall or may, at their cost, have been replaced by others of equal or greater value, as hereinafter provided; in which case the new buildings shall and will be insured in like manner by the party of the second part to the full value of the buildings removed to make place for the same; and the value of said buildings is ascertained in the schedule hereunto annexed, marked "B."

Sixth. That the party of the second part shall and will, whenever required so to do by a resolution of the board of directors of the railroad company, party of the first part, forthwith discharge from their service or employ any person or persons employed under or in pursuance of this contract, whom the party of the first part may desire to have discharged.

Seventh. That the party of the second part shall and will at all times carry from point to point along the said road, in the regular trains running thereon, the directors and officers of said railroad, and of the West Jersey Railroad, and of the Cape May and Millville Railroad, free of charge, and also such other persons as the laws of New Jersey require to be carried.

Eighth. That the party of the second part shall and will, from time to time, at their own cost and expense, place upon the said railroad, in addition to the rolling stock described in the schedule hereto annexed, such further rolling stock as may be necessary to transport all the passengers, mails, and freight offering or delivered to them to be transported. And shall further have power at their own cost and expense, and at such times and places as they may deem most suitable for fulfilling the purposes of this contract (provided such places shall be within the lim-

its of property belonging to the party of the first part, and the plan thereof be first approved by the board of directors appointed by said party of the first part), to erect buildings for staton-houses, engine-houses, tool-shops, wood-sheds, and water-tanks, and to lay side tracks, switches, and turnouts. But if, in pursuance of this provision, the party of the second part shall substitute any new in the place of any old buildings or other property, the value of the new buildings or property shall be equal to or greater than the value of the old at the date of this contract, and at the termination of this contract the value of the old buildings or property shall be deducted from the value of the new, in making the appraisement under which the parties hereto are to perfect their settlement at the time of such termination, as does hereinafter more fully appear.

Ninth. That the party of the second part shall and will collect all the bills, charges, and earnings due from the transportation of passengers, mails, and freights over the said road, and all or any other sum or sums due upon property of said railroad entrusted to them by this contract, and shall and will pay one-half of the gross sum thus collected over to the party of the first part in quarterly installments, upon the first days of November, February, May, and August, beginning November 1st, A. D. 1863.

Tenth. That the party of the second part shall and will, from and out of the other one-half of the gross sum so collected as aforesaid, which is reserved to themselves, pay the yearly sum of $10,000, in monthly installments, beginning on the first day of September, A. D. 1863, into the hands of the party of the third part, subject to the provisions hereinafter expressed.

Eleventh. And it is mutually understood and agreed between the several parties hereto, that the said yearly payment of $10,000 shall remain in the hands of the party of the third part as a fund to indemnify the party of the first part against any loss by deterioration of the roadway or superstructure, and of the rolling-stock and buildings belonging or appurtenant thereto, below their present good working condition, or their value, as expressed in the schedules hereto annexed, marked A and B, and against any loss incurred or which may be incurred by any matter or thing done or omitted by the party of the second part under or by reason of this contract. And the party of the third part does hereby agree to become liable for and chargeable with interest upon all payments made to him on account of the said fund, at the rate of five per cent. per annum, and once in every year to add this interest, payable as thus agreed upon, to the principal sum of said fund, and to hold the moneys thus obtained subject to the covenants of this contract.

Twelfth. It is mutually agreed that the said fund shall be appropriated to lay new ties to take the place of those destroyed by use or action of the weather; to replace the iron rails when worn unfit for use; or to renew the engines, cars or other rolling-stock, either by purchase, as may from time to time become necessary, or by repairs necessary to maintain and perpetuate the said stock as described in schedule A. And no appropriation of said fund shall be made to defray running expenses nor current repairs, nor any loss caused by accident, except to indemnify the party of the first part as hereinafter provided. And it is further mutually understood and agreed that in case of dispute between the parties hereto as to what are "current repairs," and what are "repairs necessary to maintain and perpetuate either roadway or rolling-stock," such question or dispute shall be decided by some competent engineer, to be then or from time to time designated or appointed by the

party of the first part, to consider and decide upon such question, and the decision of such engineer, when placed in writing, shall be conclusive, obligatory, and binding upon the parties hereto.

Thirteenth. And the said fund shall be further liable for and applied to indemnify and save harmless the party of the first part for and from any loss on account of any matter or thing done or omitted by the party of the second part or their agents, under or by reason of this contract, and against any and every breach of the party of the second part of any covenant herein contained.

Fourteenth. That no appropriation of said fund shall be made except only by an order of the board of directors, appointed by the party of the first part, and upon the authority of such order, the party of the
46 third part shall pay the sum or sums as required by said order to the party of the second part, who shall and will apply the same to the purpose of the board of directors, and such payment shall relieve the party of the third part as to and from all liability or responsibility for or in respect to the money so paid.

Fifteenth. That in case the party of the second part shall at any time omit to pay the quarterly installments of one-half the gross sum received or obtained by them under or in consequence of this contract, for thirty days after any such installments may have become due as herein provided, or shall omit to pay the monthly installments of the $10,000, as herein provided, for fifteen days after the said installments may have become due, then, without notice or demand, the board of directors, at their option, shall have power forthwith to enter upon and take possession of said railroad and all the rolling stock and buildings appurtenant or belonging thereto, and this contract shall be at an end except so far as may be necessary to secure and indemnify the party of the first part against any loss or damage on account of any breach of this contract by or on behalf of the party of the second part, committed prior to the termination thereof.

Sixteenth. That in case of the death of either of the persons of the party of the second part before the expiration or sooner termination of this contract, then, and in such case this contract shall be at an end, and the party of the first part shall forthwith enter upon and take possession of said railroad and the buildings and rolling stock belonging or appurtenant thereto or used thereon.

Seventeenth. That the party of the first part shall at any time have the right to put an end to this contract and to all the rights thereby given, and retake possession of the railroad and rolling stock and buildings belonging or appurtenant thereto, and upon three months' notice to that effect, given to the party of the second part, or to either of the persons thereof; but upon the termination of this contract, according to the notice thus provided, if the party of the second part shall so desire, then the party of the first part shall and will appoint a competent and disinterested person, who, together with another competent and disinterested person, appointed by the party of the second part, shall consider and decide upon the value of this contract to the party of the second part, and the loss and damage incurred by and justly and equitably due to them by reason of such termination thereof, and in the event of any difference between the persons so appointed, as aforesaid, as to the amount of damage justly and equitably due to the party of the second part as aforesaid, then, and in such case, the said two persons shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if

a third be chosen, shall be final, conclusive, and binding upon the parties thereto.

Eighteenth. That at the expiration of this contract, or other sooner termination thereof, the party of the first part shall thereupon immediately take possession of all the property, real or personal, which the party of the second part may have in their custody under or in pursuance of this contract. And the party of the second part shall and will promptly and quietly surrender the same in good order and repair. And it is mutually understood and agreed that, upon such taking possession, the property so taken possession of shall be valued and appraised by two competent and disinterested persons, one to be chosen by the party of the first part and the other by the party of the second part. And if the total valuation and appraisement shall be found to exceed the ascertained value of the property, whether real or personal, entrusted to the party of the second part under or in pursuance of this contract, then in such case the party of the first part shall and will thereupon pay to the party of the second part the amount of such excess. But if upon such valuation it shall be found that the said property has deteriorated in value to a sum less than affixed thereto at the time of entrusting the same as aforesaid, then and in such case the amount of such depreciation shall be paid by the party of the third part out of the fund placed in his hands, as hereinbefore pro-
47 vided. And if the amount of said fund shall not be sufficient to make good the amount of such depreciation, then, and in such case, the party of the second part shall and will make good the deficit.

Nineteenth. That the party of the third part shall and will, at the expiration or sooner determination of this contract, pay over to the party of the second part the fund placed in his hands as aforesaid, after having deducted therefrom all sums necessary to make good and defray any depreciation in the value of the railroad and rolling stock and buildings belonging or appurtenant thereto, and any loss by reason of any or every breach of any of the covenants on the part of the party of the second part herein contained; and any loss by accident occurring on said railroad or by anything done or omitted by the party of the second part under or by reason of this contract.

Twentieth. And it is mutually understood and agreed between the parties hereto, that if either the party of the first part or second part shall refuse or omit, for the period of three days after any request so to do, to name a competent and disinterested person to make the valuation or appraisement herein provided, then and in such case, at the expiration of said three days, the party not making such default shall name another competent and disinterested person to act for such party in default, and the two persons thus acting as aforesaid (whether named by the two parties as aforesaid, or by one party in default of the other, as aforesaid), in the event of any difference between them as to the subject of such reference, shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or a majority of said three persons, if a third be chosen, shall be final, conclusive, and binding upon the parties hereto.

Twenty-first. And it is mutually understood and agreed that no claim arising from any parol understanding or agreement, whether past or to come, shall at any time be set up by either party hereto to affect the various covenants and agreements herein expressed, or to give any cause of action whatever to either of the parties hereto.

Twenty-second. And it is mutually understood and agreed that this contract shall take effect as though executed and binding upon the first day of August, A. D. eighteen hundred and sixty-three, and shall continue to be of effect and binding until the first day of August, eighteen hundred and eighty-three, unless otherwise sooner terminated according to the various covenants and agreements herein contained.

In witness whereof the parties hereto have severally placed their hands and seals the day and year first hereinbefore written.

Sealed, signed, and delivered in presence of

[SEAL.] WILLIAM D. KEMBLE,
Secretary.

Witnesses present:

WILLIAM D. KEMBLE.
THOMAS H. WHITNEY, *President.* [SEAL.]
GEORGE W. THOMAS. [SEAL.]
N. FRANK CHEW. [SEAL.]
A. S. PORTER [SEAL.]
RICHARD D. WOOD. [SEAL.]

48 CHAPTER LXXXI.

An act to incorporate the Millville and Glassboro' Railroad Company.

1. Be it enacted by the senate and general assembly of the State of New Jersey, That Thomas H. Whitney, Mathias P. Crane, John M. Moore, Joshua Richman, Samuel A. Whitney, Benjamin Harding, Samuel J. Bayard, John W. Cain, Nathaniel Stratton, William D. Kemble, Ferdinand F. Sharp, John McNeal, Russell D. Greene, Isaac B. Mulford, Isaac Sparpless, Furman L. Mulford, Francis Lee, George B. Cooper, and such other persons as may be hereafter associated with them, be and are hereby ordained, constituted, and declared to be a body politic and corporate, in fact and in name, by the name of the "Millville and Glassboro' Railroad Company," and shall be capable of purchasing, holding, and conveying any lands, tenements, goods, and chattels whatsoever necessary or expedient for the object of this incorporation.

2. And be it enacted, That the amount of the capital stock of said company shall be three hundred thousand dollars, with liberty to increase the same to five hundred thousand dollars, and shall be divided into shares of fifty dollars each, which shall be deemed personal
49 property and transferable in such manner as the said corporation shall by their by-laws direct.

3. And be it enacted, That the above named persons, or a majority of them, shall be commissioners to open books to receive subscriptions to the capital stock of said corporation at such time or times, and place and places, as they or a majority of them may think proper, giving at least twenty days' notice of the same in two of the newspapers published in this State, and at the time of subscribing, ten per centum shall be paid for each share subscribed for, to the commissioners or some one of them, and as soon as one hundred thousand dollars of the capital stock shall be subscribed, such commissioners shall give like notice for a meeting of the stockholders to choose nine directors, a majority of whom shall be residents of this State; and such election shall be made at the time and place appointed by such of the stockholders as shall attend for that purpose, either in person or by proxy, each share of the capital stock entitling the holder thereof to one vote; and the said above named persons or any three of them shall be inspectors of the first election of directors

of the said corporation, and shall certify under their hands the names of those persons duly elected and deliver over the subscriptions,
50 books, and money paid in, deducting all expenses previously incurred to the said directors. And the time and place of holding the first meeting of said directors shall be fixed by the said persons named in the first section of this act, or a majority of them. And the directors chosen at such meeting, or at the annual election of the corporation, shall, as soon as may be after every election, choose out of their own number a president, who shall be a resident of this State; and in case of the death, resignation, or removal of the president, or any director, such vacancy or vacancies may be filled for the remainder of the year in which they may happen by the said board of directors, or a majority of them; and in case of the absence of the president, the said board of directors, or a majority of them, may appoint a president pro tempore, who shall have such powers and functions as the by-laws of the said corporation shall provide.

4. And be it enacted, That in case it shall happen that an election of directors should not be made during the day, when pursuant to this act it ought to be made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time in the manner provided by law in such cases, and the directors for the time being shall continue to hold their office until others shall have been chosen in their places.

51 5. And be it enacted, That five directors of said corporation shall be competent to transact all business of said corporation, and shall have power to call in the capital stock of said company by such instalments, and at such times as they may direct, by notice published in at least one of the newspapers published in said county, for the term of not less than three weeks, and in case of the non-payment of said instalments, or any one of them, to forfeit the share or shares upon which such default shall arise, and to make and prescribe such by-laws, rules, and regulations as to them shall appear needful and proper, touching the management and regulation of the stock, property, estate, and effects of the said corporation, and also shall have power to appoint such officers, clerks, and servants as to them shall seem meet, and to establish and fix such salaries to them, and also to the president, as to the said board shall appear proper.

6. And be it enacted, That the president and directors of the said company be and are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from the village of Millville, in Cumberland County, to
52 such point at or near to the village of Glassboro', in the county of Gloucester, as may be deemed advisable; and it shall and may be lawful for the said president and directors, their agents, engineers, superintendants, and others in their employ, to enter at all times upon all lands and waters for the purpose of exploring, surveying, levelling, or laying out the said route or routes of such railroad, and of locating the same, and to make and erect all necessary works, buildings, and appendages thereof, doing no unnecessary injury to private or other property; and when the route of such road shall have been determined upon, and a survey of such route deposited in the office of the secretary of state, then it shall be lawful for the said company, by its officers, agents, engineers, superintendants, contractors, workmen, and other persons in their employ, to enter upon, take possession of, hold, have, use, occupy, and excavate any such lands, and to erect embankments, bridges, and all other works necessary to lay rails, and to do all

other things which shall be suitable or necessary for the completion or repairs of the said road, subject to such compensation as is hereinafter provided: provided, that the said road shall not exceed one hundred feet in width except in such places where, from the depth of
53 the excavation, or the height of the embankment, it is necessary to take more land for the slope and protection of the said banks of said railroad, in which case so much land as will be necessary for the purpose, and no more, shall be taken, with as many set of tracks and rails as the company may deem necessary: and provided always, that the payment or tender of the payment of all damages for the occupancy of lands through which the said railroad may be laid out, be made before the said company, or any person under their direction or employ, shall enter upon or break ground in the premises, except for the purpose of surveying and laying out said road, unless the consent of the owner or owners of said land be first had and obtained.

7. And be it enacted, That when the said company or its agents cannot agree with the owner or owners of such required land or materials, for the use or purchase thereof, or when, by the legal incapacity or absence of such owner or owners, no such agreement can be made, a particular description of the land or materials so required for the use of said company in the construction of said road shall be given in
54 writing, under the oath or affirmation of some engineer or proper agent of the company, and also the name or names of the occupant or occupants, if any there be, and of the owner or owners if known, and their residence, if the same can be ascertained, to one of the justices of the supreme court of this State, who shall cause the said company to give notice thereof to the persons interested, if known and in this State, or, if unknown and out of this State, to make publication thereof as he shall direct, for any term not less than ten days, and to assign a particular time and place for the appointment of the commissioners hereinafter named, at which time, upon satisfactory evidence to him of the service or publication of such notice aforesaid, he shall appoint under his hand and seal three disinterested, impartial, and judicious freeholders, residents in the county in which the land or materials in controversy lie or the owners reside, commissioners to examine and appraise the said land or materials and to assess the damages, upon such notice to be given to the persons interested, as shall be directed by the justice making such appointment, to be expressed therein, not less than ten days.

55 And it shall be the duty of said commissioners (having first taken or subscribed an oath or affirmation, before some person duly authorized to administer an oath, faithfully and impartially to examine the matter in question, and to make a true report, according to the best of their skill and understanding) to meet at the time and place appointed, and to proceed to view and examine the said land or materials, said commissioners at the same time taking into consideration all the benefit to be derived from or in consequence of the said railroad or branch road, as the case may be, to the said owner or owners, and to make a just and equitable estimate or appraisement of the value of the same, and assessment of damages as shall be paid by the company for such lands or material and damages aforesaid, which report shall be made in writing under the hands and seals of the said commissioners, or any two of them, and filed within ten days thereafter, together with the aforesaid description of the land or materials, and the appointment and oath or affirmation aforesaid, in the clerk's office of the county in which the land or materials are situated, to remain of record therein,

which report, or a copy thereof certified by the clerk of said
56 county, shall at all times be considered as plenary evidence of the right of said company to have, hold, occupy, possess, and enjoy the said land or materials, or of the said owner or owners to recover the amount of said valuation, with interest and costs, in an action of debt, in any court of competent jurisdiction, in a suit to be instituted against the company, if they shall neglect or refuse to pay the same for twenty days after demand made of their treasurer, and shall from time to time constitute a lien upon the property of the company in the nature of a mortgage; and the said justice of the supreme court shall, upon application of either party and on reasonable notice to the others, tax and allow such costs, fees, and expenses to the justice of the supreme court, commissioners, clerks, and other persons performing any of the duties prescribed in this section, as they or he shall think equitable and right, which shall be paid by the company; provided, always, that should the said company, or the owner or owners of any of the land or materials, feel himself, herself, or themselves aggrieved by the decision of the commissioners aforesaid, he, she, or they
57 may appeal to the next circuit court in the county wherein the said land or materials may lie.

8. And be it enacted, That every appeal from the decision of commissioners appointed under the preceding section shall be made in writing and in the form of petition to said court, and filed with the clerk of the said circuit court of the county wherein the land or materials appraised by the said commissioners shall be, and notice in writing of such appeal shall be given to the opposite party within ten days after the filing thereof, which proceeding shall vest in the circuit court full right and power to hear and adjudge the same, and to direct a proper issue for the trial of said controversy to be formed between the said parties, and to order a jury to be struck, and a view of the premises to be had, and the said issue to be tried at the next term of said court to be holden in the said county upon the like notice and in the same manner as other issues in the said court are tried; and it shall be the duty of the said jury to assess the value of the said land or materials and damages sustained, and if they shall find a greater sum than the said commissioners shall have awarded in favor of said owner or owners, then judgment
58 thereon with costs shall be entered against the said company and execution awarded therefor; but if the said injury shall be applied for by the owner or owners, and shall find a less sum than the company shall have offered, or the said commissioners shall have awarded, then said cost to be paid by said applicant or applicants, and either deducted out of the said sum found by the said jury or execution awarded therefor as the said court shall direct, but such application shall not prevent the company from taking the said land upon filing the aforesaid report, provided that in no case whatever shall said company enter upon or take possession of any lands of any person or persons for the purpose of actually constructing said railroad, or of making any erection or improvements whatever, or otherwise appropriating said lands to the use of said company until they have paid to the party or parties entitled to receive the same the amount assessed by the commissioners as the value of such lands or damages in case the report of the commissioners is not appealed from, or if the same is appealed from, then the amount which shall be found by the jury by whom the issue shall be tried; but
59 in case the party or parties entitled to receive the amount assessed by the commissioners in case there shall be no appeal found by the jury, and in case of appeal shall refuse, upon tender thereof being

made, to receive the same, or shall be out of the State, or under any legal disability, then the payment of the amount assessed or found as aforesaid, into the circuit court of the county where the said lands lie, shall be deemed a valid and legal payment; and further, that the party or parties entitled to receive the amount assessed by the commissioners may, upon tender thereof being made, receive the same without being barred thereby from his or her or their appeal from the report of the commissioners.

9. And be it enacted, That it shall be the duty of the said company to construct and keep in repair good and sufficient bridges or passages over or under the said railroad where any public road shall intersect and cross the same, so that the passage of carriages, horses, and cattle along the said road shall not be obstructed; and likewise when the said railroad shall intersect any farm or lands of any individual, to provide and keep in repair suitable wagonways over or under the said roads.

10. And be it enacted, That the said company may purchase, have, and hold real estate, at the commencement and termini of their
60 railro'ds, and at any intermediate depot upon the line of the same, not exceeding six acres at each place, and may erect and build thereon houses, warehouses, stables, machine shops, and such other buildings and improvements as they may deem expedient for the safety of property and the construction of carriages, and other necessary uses, and take and receive the rents, profits, and emoluments thereof, and shall have the privilege and authority to erect, build, and maintain over such rivers, creeks, or streams, as the road may cross, such piers, bridges, and other facilities as they may think expedient and necessary for the full enjoyment of all the benefits conferred by this act: provided, said company, whenever it may become necessary to cross any navigable river or creek with their road, shall construct a bridge or bridges with suitable and sufficient draws, so as not to obstruct the navigation thereof.

11. And be it enacted, That the president and directors of the said company shall declare and make such dividends as they may deem prudent and proper from time to time out of the nett profits of the said railroad.

12. And be it enacted, That the president and directors of said company shall have power to have constructed, or to purchase with the funds of the company, all machines, engines, wagons, carriages, or other vehicles, for the transportation of persons or any species of
61 property on the railroads as they may think fit, reasonable, expedient, or right.

13. And be it enacted, That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandize, freight, or passengers, and to enforce the fulfilment of such contracts.

14. And be it enacted, That if any person shall wilfully impair, injure, destroy, or obstruct the use of any railroads enjoyed under the provisions of this act, or of any of their necessary works, wharves, bridges, carriages, or machines, such person or persons so offending shall forfeit and pay to the said company the sum of fifty dollars, to be by them recovered in any court having competent jurisdiction, in an action of debt, and, further, shall be liable for all damages.

15. And be it enacted, That when five miles or more of said road shall be completed, the said company may commence running cars, for

the transportation of passengers and freight, enjoying all the privileges and subject to the restrictions created by this act.

16. And be it enacted, That as soon as the railroad with its appendages shall be finished so as to be used, the president and treasurer of said company shall file, under oath or affirmation, a statement of
62 the amount of costs of said road, including all expenses, and the amount of all purchases made by virtue of this act, in the office of the secretary of this State, and annually thereafter the president and treasurer of the said company shall, under oath or affirmation, make a statement to the legislature of this State of the proceeds of said road, and as soon as the said company shall declare among their stockholders dividends equal to seven per centum per annum, from and after the commencement of the building of said road, and so long as the said company pays dividends of seven per centum per annum upon its cost, the said corporation shall pay to the treasurer of this State a tax of one-half of one per centum on the cost of said road, to be paid annually thereafter, on the first Monday of January in each year, provided that no other tax or impost shall be levied or assessed upon the said company.

17. And be it enacted, That the said corporation shall have the power to borrow such sum or sums of money, from time to time, as shall be necessary to build, construct, or repair said road and furnish the said corporation with all the necessary engines and machinery for the uses and objects of said company, and to secure the payment thereof by bond or mortgage, or otherwise, on the said road, lands, privileges,
63 franchises, and appurtenances of or belonging to said corporation, at a rate of interest not exceeding seven per centum per annum: Provided, that it shall not be lawful for the said company to plead any statute or statutes of this State against usury, in any suit in law or equity instituted to enforce the payment of any bond or mortgage executed under this section.

18. And be it enacted, That at any time after the expiration of thirty years from the completion of the said road the legislature of this State may cause an appraisement of the said roads, and the appendages thereof, to be made by six persons, three of whom shall be appointed by the chief justice of this State, for the time being, the remaining three by the company, who, or a majority of them, shall report the value thereof to the legislature within one year from the time of their appointment, or, if they cannot agree, they shall choose a seventh who, with the aforesaid six or a majority of them, shall report as aforesaid, or in case the said company shall neglect or refuse to appoint the said three persons on their part, for two months after notice of the said appointment, by the said chief justice, then the three persons so appointed by him shall proceed to make such appraisement, which shall be binding on the said company, or in case the six commissioners shall be appointed, and they cannot agree upon the seventh man, then, upon two weeks' notice to the said company, the said chief justice shall appoint such seventh man as aforesaid, to make such appraisement as aforesaid, and
64 thereupon the State shall have the privilege, for three years, of taking the said road, with its appendages, upon the payment to the company of the amount of said report, within one year after electing to take the said road, which report shall be filed in the office of the secretary of this State, and the whole property and interest of said road and the appendages thereof shall be vested in the State of New Jersey upon the payment of the amount so reported to the said company, and it shall be the duty of the president of the company to lay before the

legislature, under oath or affirmation, when they shall so request, a full and fair statement of the costs of said road, and of the receipts and disbursements of the company: Provided always, That the aforesaid valuation shall be made without any reference to the receipts or disbursements of the company, or advance of stock, and the said valuation shall in no case exceed the first cost or valuation of said road with the appendages thereof.

19. And be it enacted, That if the said railroad shall not be commenced within five years, and be completed at the expiration of ten years, from the fourth day of July next ensuing, that then and in that case this act shall be void.

20. And be it enacted, That the governor, the chancellor, the justices of the supreme court, and the judges of the court of errors of this State, whilst travelling for the purpose of discharging the duties of their offices, and the members and officers of both houses of the legislature of this State, during their annual or other sessions, shall pass and repass on the railroad of said company, in their cars, free of charge.

Approved March 9, 1859.

66 CHAPTER CCCCXIV.

A supplement to the act entitled "An act to incorporate the Millville and Glassboro Railroad Company."

1. Be it enacted by the senate and general assembly of the State of New Jersey, That it shall be unlawful for the directors, lessees, or agents of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandize of any description, unless a single package weighing less than one hundred pounds; nor shall more than one-half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: Provided, That nothing contained in this act shall deprive the said railroad company or its lessees of the benefits of the provisions of an act entitled "An act relative to freights and fares on railways in the State," approved March 4th, 1858, and applicable to all other railroads in this State.

2. And be it enacted, That this act shall take effect immediately.

Approved April 10, 1867. (Pamphlet Laws 1867, p. 915.)

67 CHAPTER CXLV.

An act relative to freights and fares on certain railroads in this State

1. Be it enacted by the senate and general assembly of the State of New Jersey, That it shall be lawful for the Belvidere Delaware Railroad Company and the Flemington Railroad and Transportation Company to charge ten cents for each passenger for the whole distance carried whenever the present legal rates shall not amount to said sum.

2. And be it enacted, That it shall be lawful for the said companies to charge five cents for the whole distance carried for each hundred pounds of merchandise or other species of property, other than hereinafter mentioned, whenever the present legal charges shall not amount to said sum.

3. And be it enacted, That it shall be lawful for the said companies to charge three cents for the whole distance carried for each hundred

pounds of stone, coal, lime, sand, shells, ashes, iron ore, pig iron, and fire wood, when in quantities of a car load, or more, whenever the present legal rates shall not amount to said sum.

4. And be it enacted, That this act shall take effect, notwithstanding anything in the respective charters of said companies which conflicts with the provisions hereof.

5. And be it enacted, That this act shall take effect immediately.

Approved March 14, 1856. (Pamphlet Laws, page 276.)

68 CHAPTER LXXXII.

An act relative to freights and fares on railways in this State.

1. Be it enacted by the senate and general assembly of the State of New Jersey, That the privileges and provisions of an act entitled "An act relative to freights and fares on certain railroads in this State," approved March fourteenth, eighteen hundred and fifty-six, be and the same is hereby extended to all other railroads in the State.

2. And be it enacted, That this act shall take effect, notwithstanding anything in the respective charters of said companies which conflicts with the provisions thereof.

3. And be it enacted, That this act shall take effect immediately.

Approved March 4, 1858. (Pamphlet Laws, page 201.)

69 To George W. Thomas, Alfred S. Porter, and N. Frank Chew:

Whereas by a lease dated October eighth, A. D. 1863, between the Millville and Glassboro Railroad Company, of the first part, George W. Thomas and Alfred S. Porter and N. Frank Chew, of Millville, New Jersey, of the second part, and Richard D. Wood, of Philadelphia, and his heirs, executors, and administrators, of the third part, it was agreed in the seventeenth section thereof "that the party of the first part shall at any time have the right to put an end to this contract and to all the rights thereby granted, and to retake possession of the railroad and rolling stock and buildings belonging or appurtenant thereto upon three months' notice to that effect given to the party of the second part, or to either of the persons thereof, &c.

Now, therefore, this is to notify you that the Millville and Glassboro Railroad Company, party of the first part as aforesaid, will put an end to the said contract, and to all the rights thereby granted, and retake possession of the railroad and rolling stock and buildings appurtenant thereto, on the first day of April, eighteen hundred and sixty-eight.

[SEAL OF COMPANY.] THO. H. WHITNEY, *Pres.*
WM. D. KEMBLE, *Sec'y.*

70 CHAPTER CXCV.

(Pamphlet Laws 1868, page 433.)

An act to consolidate the railroad lines of West Jersey.

Whereas the West Jersey Railroad connects directly with the Millville and Glassboro' Railroad, and by means of the latter with the Cape May and Millville Railroad, and also connects directly with the Salem Railroad, forming altogether one entire system of railroads which can be operated with greater economy under one management; and whereas the West Jersey Railroad Company and Millville and Glassboro' Rail-

road Company have entered into an agreement bearing date the twelfth day of October, in the year eighteen hundred and sixty-seven, providing amongst other things for a consolidation of the two companies, so that all their corporate powers and franchises shall be merged into, and all their corporate property shall be owned by the West Jersey Railroad Company, to which the Millville and Glassboro' Company is by said agreement to assign and transfer all its corporate powers and franchises and all its railroad and appendages and other property and assets of every kind on or before the first day of April next; by which agreement it is also agreed that at or before the said assignment and trans-
71 fer, the capital stock of the West Jersey Railroad Company shall be increased by a stock dividend to sixteen thousand and eighty-three shares, amounting at par to eight hundred and four thousand dollars, and that the capital stock of the Millville and Glassboro' Railroad Company shall be as now, eight thousand one hundred shares, or four hundred and five thousand dollars, at par; and that said amounts shall then be deemed and considered the relative values of all the corporate powers and franchises and properties of said parties; that the consideration of such assignment and transfer shall be eight thousand one hundred shares of the capital stock of the West Jersey Railroad Company to be then issued as a new issue of stock by that company to the several stockholders of the Millville and Glassboro' Railroad Company in lieu of the like number of shares then severally held by them in the last-named company, they, at the time of accepting said new stock, respectively surrendering their certificates of stock in said last-mentioned company; that at or before the time of such assignment and transfer each of said companies shall pay off and discharge all its debts and liabilities except the funded debt of the West Jersey Railroad Company, existing when said agreement was made; that each company at its then next usual dividend day might declare and pay a cash dividend not exceeding the percentage of its last cash dividend, and that all their
72 other assets shall on such assignment being made pass to the West Jersey Railroad Company, with full power to sue for, collect, and apply the same to its own use; and lastly that the board of directors of the West Jersey Railroad Company shall be increased from thirteen to twenty directors; and that seven of them in the first board that shall be elected after such assignment and transfer shall be on the nomination of those persons who at the time of such assignment and transfer shall constitute the board of directors of the Millville and Glassboro' Railroad Company or a majority of them, with a proviso that the legislature at its present session may provide that the number of directors may be reduced to a number less than twenty at any time after the expiration of one year from the time when the first board of that number shall be elected, as by the said agreement substantially appears; therefore—

1. Be it enacted by the senate and general assembly of the State of New Jersey, That the said agreement for the consolidation of the said companies be, and the same is hereby, validated and confirmed, and that they be authorized to make said consolidation in the manner provided in and by said agreement, and that when such assignment and transfer of the corporate powers, franchises, and property of the
73 Millville and Glassboro' Railroad Company as is provided for in said agreement shall be made, the same shall be valid and effectual to convey and transfer the said powers, franchises, and property to, and vest them in, the West Jersey Railroad Company, subject, however, to all the debts, liabilities, and obligations of both of said com-

panies, and the West Jersey Railroad Company shall thereupon be authorized to issue the requisite shares of its capital stock as a new issue of stock of said company to the stockholders of the Millville and Glassboro' Railroad Company, in exchange for their stock in the last-named company, and in consideration of said assignment and transfer, according to the provisions of said agreement; and when such consolidation shall be effected as aforesaid, it shall be lawful for the stockholders of the West Jersey Railroad to elect for one year twenty directors, as provided in said agreement, seven of whom shall be nominated as therein contained; provided, however, that the said consolidation shall not go into effect unless the assent in writing of three-fourths in interest of the stockholders of each of said companies be given to the said consolidation prior to the first day of July next, and provided further, that if the assent of such three-fourths in interest of the stockholders of
74 each of said companies shall be given as aforesaid, the consolidation shall go into effect; but, nevertheless, if any stockholder of either of said companies who shall not have given such assent shall be dissatisfied therewith, and shall signify his or her dissent by notice in writing served on the president, secretary, or treasurer of said West Jersey Railroad Company, at any time within six months after the said assignment and transfer shall have been made as aforesaid, he or she shall receive from the said company the fair value of his or her stock, which, if not agreed on, shall be appraised by three disinterested persons, resident in this State, to be appointed by the chancellor or supreme court of this State, on reasonable notice, on the application of either party; and thereupon such stockholder shall deliver up his or her certificate of stock, if any such has been issued; and the said company may reissue the same amount of stock to any other person or persons.

2. And be it enacted, That after the term of office of the said first twenty directors, to be elected as aforesaid, shall have expired, the number of directors of said West Jersey Railroad Company may, at any annual meeting of stockholders of said company, by a vote of the majority of shares represented at such meeting, be reduced to any less
75 number than twenty to be elected by the stockholders in the usual manner.

3. And be it enacted, That the said West Jersey Railroad Company shall be and hereby is authorized to take a lease of, and to operate the Cape May and Millville Railroad and the Salem Railroad, or either of them, and all the franchises connected therewith, and for that purpose the Cape May and Millville Railroad Company and Salem Railroad Company are hereby respectively authorized and empowered to lease their said railroads respectively to the West Jersey Railroad Company for such period of time, and on such terms and conditions as may be agreed upon between the said companies respectively; provided, however, that any such lease shall be assented to in writing by three-fourths in interest of the stockholders of each of the two companies respectively between whom the same may be made; and provided further, that any stockholder not thus giving his or her assent, and being dissatisfied with such lease, shall, on giving notice as aforesaid, within six months after the execution of such lease, receive the fair value of his or her stock from the company in which he or she is such stockholder, the value to be ascertained in the manner prescribed in the first section of this act.

4. And be it enacted, That the said West Jersey Railroad Company may, at any time after the consolidation provided for in the first

76 section of this act shall have taken effect, increase its capital stock to any amount not exceeding two million of dollars.

Approved March 18, 1868.

77 Articles of agreement made and entered into the twelfth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, between the West Jersey Railroad Company, a railroad corporation under the laws of New Jersey, of the one part, and the Millville and Glassboro' Railroad Company, a like railroad corporation, of the other part.

Whereas the railroads of the said parties are connected at or near Glassboro', in the county of Gloucester, forming thereby a continuous line of railway from Camden, in the county of Camden, to Millville, in the county of Cumberland, but yet the said railroads are conducted separately by said parties for their respective uses; and whereas it is believed that a union of said parties into one corporation will promote both their own interests and the safety and convenience of the public; it is therefore hereby covenanted and agreed by and between said parties as follows, viz:

1. That the said parties and all their corporate powers and franchises shall be merged into, and all their corporate powers owned by, one of them, to wit, the said West Jersey Railroad Company, to which the said Millville and Glassboro' Railroad Company, on or before the first day of April next, shall assign and transfer all their corporate powers and franchises, and all their railroad and its appendages and other prop-

78 erty and assets of every kind and description, which they *were* now, or at the time of such assignment and transfer, may own; and that for such purpose the said parties will unite in an application to the legislature of New Jersey, at its next session, for the enactment of such laws as will authorize such assignment and transfer, and confer such other powers as will enable said parties to carry into effect all the provisions of this article of agreement.

2. That at or before the said assignment and transfer the capital stock of the said West Jersey Railroad Company shall be increased by a stock dividend to sixteen thousand and eighty-three shares, amounting, estimating at par, to eight hundred and four thousand one hundred and fifty dollars ($804,150), and the capital stock of the said Millville and Glassboro' Railroad Company shall be, as it now is, eight thousand one hundred shares, amounting, estimated at par, to four hundred and five thousand dollars ($405,000), and that said amounts shall then be deemed and considered the relative value of all the corporate powers and franchises and properties of said parties.

3. That the consideration of the said assignment and transfer shall be eight thousand one hundred shares of the capital stock of the

79 said West Jersey Railroad Company, to be issued as a new issue of stock by that company to the several stockholders of the said Millville and Glassboro' Railroad Company in lieu of the like number of shares then severally held by them in the last-mentioned company, they at the time of accepting said new stock respectively surrendering their certificates of stock in said last-mentioned company.

4. That at or before the time of such assignment each of said parties shall pay off and discharge all its debts and liabilities except the present funded debt of the said West Jersey Railroad Company; that each party, on their next usual dividend day, may declare and pay a cash dividend not exceeding the percentage of their last cash dividend, and that all the assets of said parties, as well what they now have as they

may then have, not required to pay and discharge such dividends, debts, and liabilities, shall, on such assignment and transfer, pass to the said West Jersey Railroad Company, with full power to sue for, collect, and apply the same to their own use.

5. That the board of directors of the said West Jersey Railroad Company shall be increased from its present number, thirteen, to nineteen directors, and that six of them, in the first board that shall be
80 elected after said assignment and transfer, shall be on the nomination of those persons who at the time of such assignment and transfer constitute the board of directors of the said Millville and Glassboro' Railroad Company or a majority of them; provided that by the aforesaid contemplated legislation, at the next session of the legislature, provision may be made for reducing the number of directors to a less number than nineteen, at any time after the expiration of one year from the time when the first board of that number shall be elected.

In witness whereof the said parties have hereunto severally set their common seal and attested the same by their respective presidents and secretaries on the day and year first above written.

T. JONES YORKE,
Pres'd't.

[SEAL OF THE WEST JERSEY R. R. CO.] GEO. J. ROBBINS.
Sec'ty.

THOMAS H. WHITNEY, *Pres.*

[SEAL OF THE MILLVILLE & GLASSBORO' R. R. CO.] W. D. KEMBLE, *Sec'ty.*

Sealed and delivered in the presence of (the words "ninety" and "six," in the article No. 2, being first erased and the words "eighty" and "one" written over them)—

A. BROWNING.
JOS. W. ALLEN.

81 [U. S. rev. stamp, $405.00.]

This indenture, made the first day of April, in the year of our Lord one thousand eight hundred and sixty-eight, between the Millville and Glassboro' Railroad Company, a railroad corporation under the laws of New Jersey, party of the first part, and the West Jersey Railroad Company, a like railroad corporation, party of the second part:

Whereas by a certain article of agreement made and entered into in writing, duly executed under their common seals, bearing date the twelfth day of October, eighteen hundred and sixty-seven, after reciting in substance that the railroads of the said parties were connected at or near Glassboro', in the county of Gloucester, thereby forming a continuous line of railway from Camden, in the county of Camden, to Millville, in the county of Cumberland, yet that the said railroads were conducted separately for their respective uses, and that it was believed that a union of the said parties into one corporation would promote their own interests and the safety and convenience of the public, it was among other things covenanted and agreed, by and between said parties, that the said parties and all their corporate powers and franchises should become merged into, and all their corporate property owned by, the said West Jersey Railroad Company,
82 party of the second part, and that for that purpose the said Millville and Glassboro Railroad Company, party of the first part, on or before the day of the date hereof, should assign and transfer all their corporate powers and franchises and all their railroad and its appurte-

nances and all their other property and assets which they then owned or at the time of such assignment and transfer might own; and that to enable said parties effectually to accomplish said object they would unite in application to the legislature of this State at is then next session, to enact such laws as might be necessary to effect the same, but that before the said assignment and transfer the capital stock of the said West Jersey Railroad Company should be increased by a stock dividend to sixteen thousand and eighty-three shares, and that the capital stock of the said Millville and Glassboro Railroad Company should remain as it then was at eight thousand one hundred shares, and that the consideration of the said assignment and transfer should be eight thousand one hundred shares of the capital stock of the said West Jersey Railroad Company to be then issued as a new issue of the stock of that com-
83 pany to the several stockholders of the said Millville and Glassboro Railroad Company in lieu of the like number of shares severally held by them in the last mentioned company, they, at the time of accepting said new stock, respectively surrendering their certificates of stock in the said last mentioned company, as by reference to said articles of agreement will more fully appear.

And whereas, upon an application of said parties to the legislature of this State, pursuant to their said agreement, the said legislature, by an act entitled "An act to consolidate the railroad lines of West Jersey," approved on the eighteenth day of March last, after reciting, by way of preamble, the substance of said article of agreement, did, among other things, enact that the said agreement for the consolidation of the said companies (meaning the said parties hereto) should be, and the same was thereby, validated and confirmed; and that they (meaning said parties) should be authorized to make said consolidation in the manner provided for in and by said agreement; and that when the assignment and transfer of the corporate powers, franchises, and property of the said Millville and Glassboro Railroad Company should be made
84 as provided for in said agreement, the same should be valid and effectual to convey and transfer the said powers, franchises, and property to, and vest them in, the said West Jersey Railroad Company, subject, however, to all the debts, liabilities, and obligations of both of said companies, and that the said West Jersey Railroad Company should be thereupon authorized to issue the requisite shares of its capital stock as a new issue to the stockholders of the said Millville and Glassboro Railroad Company in exchange for their stock in said last mentioned company, as by reference to said act will more fully and at large appear:

Now this indenture witnesseth that the said party of the first part, in pursuance of the said agreement and of the said act and for and in consideration of the premises and of eight thousand one hundred shares of the capital stock of the said party of the second part, issued and to be issued by the said party of the second part to the several stockholders of the capital stock of the said party of the first part in lieu of the like number of shares held by them of the last mentioned stock, have granted, bargained, sold, aliened, enfeoffed, released, assigned, and con-
85 firmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm unto the said party of the second part, their successors and assigns, all the corporate powers, franchises, and privileges, and all the said railroad of the said party of the first part extending from at or near Glassboro to Millville, in the county of Cumberland, in the county of Gloucester, and all the lands on which the same is located and constructed, and all the materials of which the same is constructed, and all its station houses and other appendages, and all its

other property assets of every kind and description in law or equity, and all the estate, right, title, interest, property, possession, claim, and demand of the said party of the first part of, in, and to the same:

To have and to hold the same, with all and singular, the appurtenances unto the said party of the second part, their successors and assigns, to the only proper use and behoof of the said party of the second part, their successors and assigns forever. And it is hereby covenanted and agreed between the said parties hereto that so much of the aforesaid article of agreement as has not already been performed and not
86 necessarily merged in and by this indenture shall be deemed and considered as valid and to remain until duly performed according to the true intent and meaning of said agreement. In witness whereof the said party of the first part have and do hereunto set their common seal and attest the same by their president and secretary the day and year first above written.

THOS. H. WHITNEY, *President.*
[SEAL] WM. D. KEMBLE, *Sec'ty.*

Sealed and delivered in the presence of—
JOS. W. ALLEN.
GEO. WOOD.

STATE OF NEW JERSEY,
Camden County, ss:

Be it remembered that on the first day of April, in the year of our Lord one thousand eight hundred and sixty-eight, before me, Abraham Browning, one of the masters in the court of chancery of New Jersey, personally appeared Joseph W. Allen, one of the subscribing witnesses to the above indenture of conveyance, and, being by me duly sworn, on his solemn oath did depose and say that he was present at the time of the execution of said indenture and saw Thomas H. Whitney, the president of the Millville and Glassboro' Railroad Company,
87 the grantor therein mentioned, sign, seal, and deliver the same as the voluntary act and deed of the said company, by affixing thereto the common seal of said company (with which he, said deponent, was acquainted), and attesting the same by his own hand and that of the secretary of said company; and that at the same time he, said deponent, subscribed his name as a witness thereto.

All of which is hereby certified.

A. BROWNING.

Recorded April 13, 1868.

FRANKLIN, *Clk.*

STATE OF NEW JERSEY,
County of Gloucester, ss:

I, S. Paul Loudenslager, clerk of said county and of the records thereof, hereby certify the foregoing writing to be a true copy of the deed between the parties therein named, as the same is found of record in my office in book G⁵ of deeds, folio 490.

In testimony whereof I have hereunto set my hand and affixed the seal of said county at Woodbury. Dated this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

{ CLERK' SEAL OF THE COUNTY OF GLOUCESTER, NEW JERSEY. } S. PAUL LOUDENSLAGER.

88 Whereas, by an agreement made between the West Jersey Railroad Company and the Millville and Glassboro' Railroad Company,

bearing date the twelfth day of October, in the year eighteen hundred and sixty-seven, a consolidation of said companies has been agreed upon on certain terms therein expressed; which agreement has been sanctioned and validated by an act of the legislature of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," approved March 18th, A. D. 1868; and which agreement and consolidation require and are subject to the assent of three-fourths in interest of the stockholders of each of said companies:

Therefore the undersigned stockholders of the West Jersey Railroad Company, holding the number of shares respectively set opposite to their names, do hereby signify and express their assent to and ratification of said agreement and the said acts confirmatory thereof.

(Here follow signatures of stockholders.)

89 Whereas, by an agreement made between the West Jersey Railroad Company and the Millville and Glassboro' Railroad Company, bearing date the twelfth day of October, in the year eighteen hundred and sixty-seven, a consolidation of said companies has been agreed upon on certain terms therein expressed; which agreement has been sanctioned and validated by an act of the legislature of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," approved March 18, 1868; and which agreement and consolidation require and are subject to the assent of three-fourths in interest of the stockholders of each of said companies:

Therefore the undersigned stockholders of the Millville and Glassboro' Railroad Company, holding the number of shares respectively set opposite to their names, do hereby signify and express their assent to and ratification of said agreement and the said acts confirmatory thereof.

(Here follow signatures of stockholders.)

90 To Thomas H. Whitney, president of The Millville & Glassboro' Railroad Company:

You are hereby requested and desired by us, the subscriber, to name and appoint a person or persons to act for and in behalf of said railroad company in considering and deciding upon the value of the lease or contract made by and between the said The Millville & Glassboro' Railroad Company of the first part, the subscribers, of the second part, and Richard D. Wood, of the third part, dated October 8th, 1863, and the loss and damage incurred by and due to the subscribers by reason of the termination thereof, and to value and appraise all the property, real and personal, held by the subscribers, party of the second part to said contract or lease, under or in pursuance thereof, in accordance with the conditions and requirements mentioned and set forth in said lease or contract.

Dated April 13th, 1868.

G. W. THOMAS,
N. J. CHEW,
ALFRED S. PORTER,
Lessees of M. & G. R. R.

Copy of notice served on Thos. H. Whitney, pres't Millville & Glassboro' R. R. Co., on April 13th, 1868, in presence of Robert S. Tice, of Millville.

91 To The Millville and Glassboro' Railroad Company:

Whereas by a certain lease, contract, or agreement in writing

made by and between the said The Millville and Glassboro' Railroad Company of the first part, George W. Thomas, Alfred S. Porter, and N. F. Chew, of the second part, and Richard D. Wood, of the third part, and bearing date the eighth day of October, in the year of our Lord one thousand eight hundred and sixty-three, it was among other things provided, "That the party of the first part shall at any time have the right to put an end to this contract and to all the rights thereby given, and retake possession of the railroad and rolling stock and buildings belonging or appurtenant thereto, upon three months' notice to that effect given to the party of the second part, or to either of the persons thereof; but upon the termination of this contract according to the notice thus provided, if the party of the second part shall so desire, then the party of the first part shall and will appoint a competent and disinterested person, who, together with another disinterested and competent person, appointed by the party of the second part, shall consider and decide upon the value of this contract to the party of the second part,
92 and the loss and damage incurred by and justly and equitably due to them by reason of such termination thereof, and in the event of any difference between the persons so appointed as aforesaid, as to the amount of damage justly and equitably due to the party of the second part as aforesaid, then and in such case the said two persons shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third be chosen, shall be final, conclusive, and binding upon the parties hereto.

"And it is mutually understood and agreed between the parties hereto, that if either the party of the first part or of the second part shall refuse or omit for the period of three days after any request so to do to name a competent and disinterested person to make the valuation or appraisement herein provided, then and in such case, at the expiration of said three days, the party not making such default shall name another competent and disinterested person to act for such party in default, and the two persons thus acting as aforesaid (whether named by the two parties as aforesaid or by one party in default of the
93 other party as aforesaid), in the event of any difference between them, as to the subject of such reference, shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third be chosen, shall be final, conclusive, and binding upon the parties hereto."

And whereas the said The Millville and Glassboro Railroad Company, party of the first part to said lease, contract, or agreement, by their notice in writing, directed to the said George W. Thomas, Alfred S. Porter, and N. Frank Chew, party of the second part to said lease, contract, or agreement, and duly served on or about the twentieth day of November, eighteen hundred and sixty-seven, did notify said party of the second part to said lease, contract, or agreement, "that they would put an end to said contract and to all the rights thereby granted and retake possession of the railroad and rolling stock and buildings appurtenant thereto on the first day of April, eighteen hundred and sixty-eight."

And whereas the said The Millville and Glassboro Railroad
94 Company, in pursuance of said notice, did on the said first day of April, eighteen hundred and sixty eight, put an end to said contract, lease, or agreement, and take possession of said railroad, rolling stock, and buildings appurtenant thereto:

Now, therefore, the said The Millville and Glassboro Railroad Company, party of the first part to said lease, contract, or agreement, are hereby requested and desired by us, the said party of the second part to said lease, contract, or agreement, to appoint, in accordance with the provisions of said lease, contract, or agreement, a competent and disinterested person, who, together with a competent and disinterested person appointed by us, party of the second part to said lease, contract, or agreement, shall consider and decide upon the value of said above-mentioned and in part recited contract to us the party of the second part thereto, and the loss and damage incurred by and justly and equitably due to us, party of the second part to said lease, contract, or agreement, by reason of the aforesaid termination of said lease, contract, or agreement.

And we do hereby nominate and appoint Matthew Baird, a competent and disinterested person, to act together with another to be appointed by you for the purposes aforesaid.

Dated May 22d, 1868.

GEORGE W. THOMAS.
ALFRED S. PORTER.
N. T. CHEW.

Witness present at signing:
JERVIS SHARP.

95 *Copy of submission.*

Articles of agreement made and entered into the twenty-first day of December, A. D. 1868, between George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of Millville, N. J., of the first part, and the West Jersey Railroad Company, a corporation under the laws of New Jersey, of the second part.

Whereas, in and by a certain agreement bearing date the 8th of October, 1863, the Millville and Glassboro' Railroad Company, a corporation under the laws of New Jersey, then owning a railroad from, at, or near Glassboro, in the county of Gloucester, to Millville, in the county of Cumberland, in New Jersey, (a distance of about twenty-two miles), with certain buildings, machine-shops, offices, stations, rolling stock, machinery, implements, and materials on and along the line thereof, particularly enumerated in a schedule marked A, annexed to said agreement, in consideration of certain covenants in said agreement specified, to be performed by and on the part of the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, did lease the said railroads, buildings, machine-shops, offices, stations, rolling stock, machinery, implements, and materials to them, the said George, Alfred, and Nathaniel, for the term of twenty years, viz, from the first day of August, 1863, to the first day of August, 1883, but with a proviso or provision in said agreement contained, to the effect that the said Millville and Glassboro' Railroad Company might then upon, at any time during said term, terminate the same by giving to said George, Alfred, and Nathaniel three months' notice of their intention so to terminate the same; but also, with a further provision that if the said term should be so terminated, that the said George, Alfred, and Nathaniel might have the value of their said unexpired term, and the damage arising to them by reason of such termination, determined by arbitration, in a mode provided for in said agreement, as by reference to said agreement will more fully and accurately appear, and to which, for greater certainty, the said parties hereto refer.

And whereas, in and by the aforesaid agreement, leasing said railroad and it appurtenances to the said George, Alfred, and Nathaniel, they did, among other things, covenant with the said The Millville and Glassboro' Railroad Company, that they would, at their own cost, maintain the said railroad and rolling stock thereof in their then good working condition, and on the termination of their said term would surrender the same, and all other property held by them under the said agreement, in good order and repair, as by reference to said agreement will more fully appear.

And whereas the said Millville and Glassboro' Railroad Company, by notice as aforesaid, terminated the said term on the first day of April, 1868, and afterwards, to wit, on the same first day of April, in pursuance of a certain contract theretofore entered between the said The Millville and Glassboro' Railroad Company and the said West Jersey Railroad Company, and of a certain act of the legislature of New Jersey, confirming said contract, approved March 18th, 1868, the said The Millville and Glassboro' Railroad Company, by indenture bearing date the said first day of April, 1868, assigned all their corporate powers, franchises, and privileges, and all their property and assets, to the said The West Jersey Railroad Company, as by reference to said contract, enactment, and indenture will more fully appear, and to which, for greater certainty, the parties hereto refer.

96 And whereas in and by said enactment it is, among other things, provided that on making the aforesaid assignment of the corporate powers, franchises, privileges, property, and assets to the said The West Jersey Railroad Company as aforesaid, the same should be valid and effectual to convey and transfer the said powers, franchises, and property to and vest them in that company, but subject to all the debts, liabilities, and obligations of the said The Millville and Glassboro Railroad Company, as by reference to said enactment will also more fully appear.

And whereas the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, party of the first part hereto, claim that their aforesaid unexpired term was of considerable value to them, and that they have sustained loss and damage by the aforesaid termination thereof, which the said The West Jersey Railroad Company, party of the second part hereto, are liable to pay; and the said The West Jersey Railroad Company, on the other hand, claim that the said George, Alfred, and Nathaniel failed to keep and surrender said leased premises in proper condition and repair, and are liable therefor to the said The West Jersey Railroad Company.

And whereas neither of the parties hereto admit such or any other liability to the other, but are yet willing and have agreed to submit to arbitration, as hereinafter stated, all matters in difference between them arising out of or in anywise resulting from the covenants and provisions contained in the aforesaid agreement demising the said railroad and other premises, and the said termination of the term thereof, and said subsequent assignment, to the said The West Jersey Railroad Company:

Now this article witnesseth, that the said parties hereto have covenanted and agreed each with the other to submit, and hereby do submit, all the aforesaid matters in difference between them that have arisen, or that can or may in anywise arise out of or result from the covenants and provisions contained in the aforesaid agreement, demising the said railroad and other premises to the award and final determination of Henry F. Kenney and Matthew Baird, of the city of Philadelphia, in

the State of Pennsylvania, arbitrators by them agreed upon and chosen; and do further covenant and agree that said arbitrators, having taken upon themselves the burden of this submission, shall have full power and authority to ascertain and determine upon all the said matters in difference, and all damages, if any, that either party should pay to the other for or on account of said matters in difference.

And they, the said parties hereto, have further covenanted and agreed each with the other, and hereby do further covenant and agree each with the other, to stand to, abide by, pay, and perform the award of said arbitrators in the premises, so that the same be made in writing signed by them, and ready for delivery to the parties on or before the first day of July next after the day of the date hereof.

And the said parties hereto have further covenanted and agreed each with the other, and hereby do further covenant and agree each with the other, that if the said arbitrators should be unable to agree upon an award, then they, said arbitrators, may themselves select some third person as umpire, who as a third arbitrator shall join them in the submission aforesaid, and that the said three arbitrators, or any two of them, shall have full power and authority to ascertain and determine upon all the said matters in difference, and that their award, or
97 the award of any two of them, in the premises aforesaid, made in writing and signed by any two of them, and ready for delivery as aforesaid on or before the said first day of July next, shall be binding and conclusive upon the said parties hereto, and they, said parties, also covenant and agree each with the other to stand to, abide by, pay, and perform the same.

And the said parties hereto have further covenanted and agreed each with the other, and hereby do further covenant and agree, each with the other, that the submission is and shall be deemed and considered irrevocable; and that if either party hereto shall revoke or attempt to revoke the same, that such revocation, or attempted revocation, shall be a full and absolute release, acquittance, and discharge by the party so revoking or attempting to revoke this submission to the other party hereto, of and from all action and actions and causes of action, and of and from all claims and demands in law or equity, for or on account of all or any of the matters referred to as aforesaid to said arbitrators; and that in addition to said release, acquittance, and discharge, the said party so revoking or attempting to revoke this submission, shall forfeit and pay to the other party hereto, as fixed and liquidated damages, the sum of fifty thousand dollars.

In witness whereof, on the day and year first above written, the said party of the first part have hereunto set their hands and seals, and the said party of the second part have hereunto set their common seal and attested the same by their president and secretary.

(Signed) GEO. W. THOMAS. [L. S.]
A. S. PORTER. [L. S.]
N. F. CHEW. [L. S.]
T. JONES YORKE. [L. S.]
President West Jersey Railroad Company.
GEO. J. ROBBINS, [L. S.]
Secretary West Jersey Railroad Company.

Signed, sealed and delivered in the presence of, as to the signatures of Geo. W. Thomas, A. S. Porter, and N. F. Chew,
PETER L. VOORHEES.

And as to the West Jersey Railroad Company, in presence of—
JOS. W. ALLEN.

STATE OF NEW JERSEY,
Camden County, ss:

Henry F. Kenney and Matthew Baird, of the city of Philadelphia, in the State of Pennsylvania, the arbitrators mentioned in the above articles of agreement, being severally duly sworn, on their solemn oath say that they will faithfully and fairly hear and examine the matters in difference between the said parties to the said articles of agreement, and thereby submitted to them, these deponents, and make a just and true award, according to the best of their skill and understanding.

(Signed) H. F. KENNEY. [L. S.]
M. BAIRD. [L. S.]

Sworn and subscribed at the city of Camden, this twenty-first day of January, A. D. one thousand eight hundred and sixty-nine, before me, one of the masters in chancery of New Jersey.

CHARLES P. STRATTON, *M. C.*

98 *Copy of award.*

Whereas heretofore, to wit, on the twenty-first day of December, A. D. 1868, certain articles of agreement under seal were made, concluded, and agreed upon between George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of Millville, in the State of New Jersey, of the first part, and the West Jersey Railroad Company, a corporation under the laws of the State of New Jersey, of the second part, in which said agreement, after reciting, among other things, that—

Whereas in and by a certain agreement, bearing date on the eighth day of October, eighteen hundred and sixty-three, the Millville and Glassboro Railroad Company, owning a railroad from, at, or near Glassboro, in the county of Gloucester, to Millville, in the county of Cumberland, in New Jersey, with certain buildings, machine-shops, offices, stations, rolling-stock, machinery, implements, and materials, on and along the line thereof, in consideration of certain covenants in said agreement specified to be performed by and on the part of said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, did lease the said railroad, buildings, machine-shops, offices, stations, rolling stock, machinery, implements, and materials, to them, the said George, Alfred, and Nathaniel, for the term of twenty years, from the first day of August, eighteen hundred and sixty-three, to the first day of August, eighteen hundred and eighty-three; but with a proviso in said agreement contained to the effect that the said Millville and Glassboro Railroad Company might thereafter, at any time during said term, terminate the same, by giving to the said George, Alfred, and Nathaniel three months' notice of their intention so to terminate the same, but also with the further provisions that if the said term should be so terminated, then the said George, Alfred, and Nathaniel might have the value of their said unexpired term, and the damages arising to them by reason of such termination, determined by arbitration in a mode provided for in said agreement.

And whereas in and by the aforesaid agreement leasing said railroad and its appurtenances to the said George, Alfred, and Nathaniel, they did, among other things, covenant with the said Millville and Glassboro Railroad Company that they would, at their own cost, maintain the said railroad and rolling stock thereof in their then good working condition, and on the termination of the said term would surrender the same, and

all other property held by them under said agreement, in good order and repair.

And that whereas the said Millville and Glassboro Railroad Company, by notice as aforesaid, terminated said term on the first day of April, eighteen hundred and sixty-eight, and afterwards, on the same first day of April, eighteen hundred and sixty-eight, in pursuance of a certain contract theretofore entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, and of a certain act of the legislature of New Jersey confirming said contract, approved on the eighteenth day of March, eighteen hundred and sixty-eight, the said Millville and Glassboro Railroad Company, by indenture, bearing date the said first day of April, assigned all their corporate powers, franchises, and privileges, and all their property and assets, to the said The West Jersey Railroad Company.

99 And that whereas in and by said enactment it is among other things provided that upon making the aforesaid assignment of the corporate powers, franchises, privileges, property, and assets to the said The West Jersey Railroad Company as aforesaid, the same should be valid and effectual to convey and transfer the said powers, franchises, and property to and vest them in that company, but subject to all the debts, liabilities, and obligations of the said The Millville and Glassboro Railroad Company.

And whereas the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, party of the first part to said agreement, claiming that their aforesaid unexpired term was of considerable value to them, and that they have sustained loss and damage by the aforesaid termination thereof, which the said West Jersey Railroad Company, party of the second part to said agreement, are liable to pay; and the said The West Jersey Railroad Company on the other hand claiming that the said George, Alfred, and Nathaniel failed to keep and surrender said leased premises in proper condition and repair, and are liable, therefore, to the said West Jersey Railroad Company.

And that whereas neither of the said parties to said agreement admit such or any other liability to the other, but are yet willing and have agreed to submit to arbitration as thereinafter stated, all matters in difference between them arising out of or in any wise resulting from the covenants and provisions contained in the aforesaid agreements demising the said railroad and other premises, and the said termination of the term thereof, and said subsequent assignment to the said The West Jersey Railroad Company:

It was agreed, and the said parties did thereby agree each with the other, to submit, and thereby did submit, all the aforesaid matters in difference between them that had arisen, or that could in any wise arise or result from the covenant or provisions contained in the aforesaid agreement demising said railroad and other premises to the award and final determination of Henry F. Kenney and Matthew Baird, of the city of Philadelphia, and State of Pennsylvania, arbitrators by them agreed upon and chosen; and did further covenant and agree that the said arbitrators, having taken upon themselves the burden of said submission, should have full power and authority to ascertain and determine upon all the said matters in difference, and all damages, if any, that either party should pay to the other for or on account of the said matters in difference; and the said parties to said agreement did thereby further covenant and agree, each with the other, to stand to, abide by, pay, and perform the award of said arbitrators in the premises, so that the same be made in writing, signed by them, and ready for

delivery to the parties on or before the first day of July next after the date of the said agreement.

And the said parties to said agreement did thereby further covenant and agree, each with the other, that if the said arbitrators should be unable to agree upon an award, then they, the said arbitrators, may themselves select some third person as umpire, who, as third arbitrator, shall join them in the submission aforesaid, and that the said three arbitrators, or any two of them, should have full power and authority to ascertain and determine upon all the said matters in difference, and all damages, if any, either party should pay to the other, for or on account of the said matters in difference, and that their award, or the award of any two of them in the premises aforesaid, made in writing and signed by them, or any two of them, and ready for delivery as aforesaid, on or before the said first day of July then next ensuing, should be binding and conclusive on the said parties to said agreement, and the said parties did thereby also covenant and agree, each with the other, to stand to, abide by, pay, and perform the same.

And whereas the said Henry F. Kenney and Matthew Baird, having been first duly sworn faithfully and fairly to hear and examine the matters in difference between the said parties, and make a just and true award, according to the best of their skill and understanding, and having taken upon themselves the burden of said submission, and examined the matters in difference between the said parties, and being unable to agree upon an award, they, the said Henry F. Kenney and Matthew Baird, arbitrators as aforesaid, did on the sixteenth day of June, eighteen hundred and sixty-nine, select, nominate, and appoint Rufus A. Wilder, of Cresonna, county of Schuylkill, State of Pennsylvania, as umpire or third arbitrator, to act with them in the submission aforesaid, and the said Rufus A. Wilder, having been first duly sworn faithfully and fairly to hear and examine the matters in difference between the said parties, and make a just and true award, according to the best of his skill and understanding, did, as umpire or third arbitrator, join with the said Henry F. Kenney and Matthew Baird, arbitrators as aforesaid, and proceed to ascertain and determine upon all the said matters in difference, and all the damages, if any, that either party should pay to the other for or on account of the said matters in difference, submitted as aforesaid, and having heard and examined the allegations and proofs of the parties and considered the same, we, the subscribers, arbitrators appointed as aforesaid, do hereby make and publish our award in writing of and concerning the matters in the said submission contained and to us, the said arbitrators, submitted as aforesaid, as follows:

We do determine and award that the value of the said unexpired term, and the loss and damages sustained by reason of the termination thereof, to and by the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, over and above all the claims made by the said The West Jersey Railroad Company, for not keeping the said railroad in proper condition and repair, and for all other claims made and insisted upon by the said The West Jersey Railroad Company before us, was and is the sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents.

And we do determine and award that the said The West Jersey Railroad Company pay to the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew the aforesaid sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents, on or before the twenty-ninth (29th) day of July next ensuing.

And we do determine and award that the said sum is in full satisfaction of all demands and controversies by and between the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, and the said The West Jersey Railroad Company, and that all controversies and demands whatsoever between the said parties respectively, to the day of the date of the aforesaid submission, cease and be determined.

And we do determine and award that the moneys paid by the
101 said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew to Richard D. Wood, under the provisions of the aforesaid lease or agreement and known and designated as the renewal fund, and claimed by the West Jersey Railroad Company, be paid to the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, and that the West Jersey Railroad Company release to them all claim for the same.

And we do determine and award that the said West Jersey Railroad Company pay the sum of seventy-five dollars on demand, being the one-half fees and expenses of Rufus A. Wilder, the arbitrator chosen as aforesaid, and that all other the costs and charges of either party be borne and paid by the party incurring the same.

In witness whereof we have hereunto set our hands this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

(Signed) M. BAIRD. [L. S.]
R. A. WILDER. [L. S.]

102 *Bill of complaint.—Filed July* 29, 1869.

In chancery of New Jersey.

BETWEEN WEST JERSEY R. R. CO., Complainant,
and
GEORGE W. THOMAS, ALFRED S. PORTER, and Nathaniel F. Chew, defendants. } Bill, &c.

A. Browning, solicitor of complainant.

To the honorable Abraham O. Zabriskie, chancellor of the State of New Jersey:

Humbly complaining, showeth unto your honor, your orator, the West Jersey Railroad Company, a corporation and body politic, under and by virtue of the laws of New Jersey, that under and by virtue of a certain act of the legislature of New Jersey, approved on the fifth day of February, eighteen hundred and fifty-three, and of six several supplements thereto—the first approved on the sixteenth day of March, eighteen hundred and fifty-seven; the second, on the twelfth day of March, eighteen hundred and sixty; the third, on the ninth day of February, eighteen hundred and sixty-one; the fourth, on the twenty-fourth day of March, eighteen hundred and sixty-two; the fifth, on the eleventh day of March, eighteen hundred and sixty-four; and the sixth on fifteenth day of the same last mentioned month of March—your orator was created, became and now is a corporation and body politic, with the franchises, powers and privileges granted in and by said act of incorporation, and said supplements thereto; to which, for greater certainty,

your orator prays leave to refer, as a part of this his bill, as fully as if the same were herein set forth, word for word.

And your orator further showeth that under and by virtue of said powers, franchises, and privileges, and in part execution of them, your orator surveyed, laid out, constructed, equipped and put into operation a railroad from the city of Camden, in the county of Camden, to the town of Glassboro', in the county of Gloucester—a distance of
103 about eighteen miles, prior to the eighteenth day of March, eighteen hundred and sixty-eight.

And your orator further showeth that under and by virtue of a certain other act of the legislature of New Jersey, approved on the ninth day of March, eighteen hundred and fifty-nine, a certain other corporation and body politic was created, by the name of the Millville and Glassboro' Railroad Company, with power to lay out, construct, and put in operation a certain other railroad from the said town of Glassboro' to Millville,* in the county of Cumberland, a distance of about twenty-three miles, in a southwardly direction from said Glassboro'; under and by virtue of which said company, also, prior to said eighteenth day of March, eighteen hundred and sixty-eight, had surveyed, laid out, constructed, equipped and put in operation a railroad from Glassboro' aforesaid, to the said town of Millville; and that said two railroads were connected at the said town of Glassboro', and formed together a connected line of railway from the said city of Camden to the said town of Millville,* a distance of about forty-one miles.

And your orator further showeth that prior to the said eighteenth day of March, eighteen hundred and sixty-eight, the said Millville and Glassboro' Railroad Company had entered into a certain agreement, in writing, with George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, together with one Richard D. Wood, bearing date the eighth day of October, eighteen hundred and sixty-three, under and by virtue of which the said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew had, or claimed to have, possession of the said railroad from Glassboro' to Millville, and of the equipments on and appertaining thereto; and to have certain estates, rights, and interests of and in said railroad and its equipments.

And your orator further showeth that under and by virtue of a certain other act of the legislature of New Jersey, approved on the said eighteenth day of March, eighteen hundred and sixty-eight, entitled "An act to consolidate the railroad lines of West Jersey," and of a certain agreement between your orator and said Millville and Glassboro' Railroad Company, mentioned and referred to in said act, the said Millville and Glassboro' Railroad Company, by a deed of indenture, bearing date the first day of April, eighteen hundred and sixty-eight, duly executed under the common seal of that company and attested by their president and secretary, assigned all the corporate powers, franchises, and privileges, and all the said railroad from Glassboro' to Millville, and all the lands on which the same had been constructed and located, and all the materials of which the same was composed, and its station houses and other appendages, and all other, its property and assets, of every kind and description, of the said Millville and Glassboro' Railroad Company, to your orator, and to the successors and assigns of your orator, forever; as by reference to said indenture, now in possession of your orator, will more fully appear.

* Erroneously Bridgeton in the original bill.

And your orator further shows that after the execution of said indenture of assignment, to wit, on or about the twenty-first day of December, eighteen hundred and sixty-eight, certain matters of difference had arisen, and then existed, between your orator, of the one part, and the aforesaid George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, of the other part, arising out of the agreements and
104 provisions contained in the aforesaid agreement between the said Millville and Glassboro Railroad Company and the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, under which they had, or claimed to have, the possession of, and certain estates, rights, and interest in the said railroad from Glassboro to Millville, and its equipments, as aforesaid; and that for determining by arbitration the said matters in difference, your orator, as party of the one part, and the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, as party of the other part, by a certain article of submission, in writing, duly executed under the common seal of your orator, and under the hands and seals of the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, submitted all the matters in difference that had arisen, and that could and might arise out of or result from the covenants and provisions in the aforesaid agreement between the said Millville and Glassboro Railroad Company and the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, to the award and final determination of Henry F. Kenney and Matthew Baird, of the city of Philadelphia, in the State of Pennsylvania, arbitrators agreed upon and chosen; whose award, in writing, signed by them, and ready for delivery to the said parties thereto on or before the first day of July then next, was to be binding and conclusive; but that if the said two arbitrators should be unable to agree upon an award, that then the said two arbitrators should select some third person, who, as a third arbitrator, should join them in said submission, and that they, the said three arbitators, should ascertain and determine on all the said matters in difference; and that their award, or the award of any two of them, made in writing and signed by them, or any two of them, and ready for delivery to the said parties to said submission on or before the said first day of July then next, should be binding and conclusive on said parties to said submission, as by reference to said article of submission, ready to be produced and proved, will more fully and at large appear, a copy of which, for greater certainty, your orator annexes hereto, and prays that it may be taken and considered as a part of this bill.

And your orator further shows that the said two arbitrators, Henry F. Kenney and Matthew Baird, chosen as aforesaid by the said parties to said submission, accepted the trust conferred upon and reposed in them by the said submission; and afterwards, on notice to the said parties thereto, they, the said arbitrators, first met at the West Jersey Railroad Company's office, or building, in the city of Camden, in this State, on the twenty-first day of January, eighteen hundred and sixty-nine, and there, in the presence of the said parties to said submission, and of their respective counsel, and before proceeding to the business submitted to them as aforesaid, were each duly sworn before Charles P. Stratton, esquire, one of the masters in the court of chancery of this State, faithfully and fairly to hear and examine the matters in difference submitted to them as aforesaid, and make a just and true award, according to the best of their skill and understanding, as by reference to their said oath, endorsed on said article of submission, will more fully appear.

And your orator further shows that after the said two arbitrators had aken on themselves the burden of said submission, and been thus sev-

erally sworn according to the statute of this State, they met, by adjournments, of which the said parties took notice, on thirteen or fourteen different days, between the time of their said first meeting and the
105 twenty-fourth day of May, eighteen hundred and sixty-nine, on which day they held their last meeting for the taking of testimony, which on that day was closed before said two arbitrators; that all of the said meetings were held at the same place, in said city of Camden, and were all attended by said parties or their counsel, in whose presence all the said testimony and other evidence was taken; and that at the close of said testimony it was agreed between the counsel of said parties and said arbitrators that said counsel, instead of proceeding with oral arguments before said arbitrators, should each reduce their arguments to writing, and deliver their written arguments, or cause them to be delivered, to said arbitrators on the Monday of the succeeding week, which was the thirty-first day of the said month of May last.

And your orator further shows, that immediately or very shortly after the said two arbitrators, Kenney and Baird, at their said first meeting, held on the twenty-first day of January, eighteen hundred and sixty-nine, had been sworn as aforesaid, they adjourned to the ninth day of the then succeeding month of February, on which day they held their first adjourned meeting, and at which a considerable number of written and printed documents and papers were, by the consent of parties, submitted and marked as exhibits, to wit:

1. The written articles of submission to said arbitrators—counterparts—with the oath or affidavit of the arbitrators endorsed, bearing date December 21st, 1868.

2. Article of agreement between the "Millville and Glassboro' Railroad Company" and George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, bearing date October 8th, 1853, to which Richard D. Wood was a third party.

3. Contract of indemnity between Richard D. Wood and George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, bearing date October 8th, 1863.

4. Agreement between the "West Jersey Railroad Company" and the Millville and Glassboro' Railroad Company, bearing date October 12th, 1867.

5. A certified copy of the act of the legislature of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," approved March 18th, 1868.

6. Consent of stockholders of the West Jersey Railroad Company to said consolidation act.

7. Consent of stockholders of the Millville and Glassboro' Railroad Company to said act.

8. Deed of assignment of the Millville and Glassboro' Railroad Company to the West Jersey Railroad Company, bearing date April 1st, 1868.

All of which papers were so offered in evidence by and on the part of your orator, except one of the counterparts of said articles of submission, by and on the part of said Thomas, Porter and Chew; and no oral or verbal testimony was submitted in evidence on that day; but, on the submission of said documentary evidence, it was agreed that each party to said submission, to wit, your orator, as the one party, and said Thomas, Porter and Chew, as the other party, should, at the next meeting, submit to said arbitrators a written statement of their respective claims against each other; and that, to avoid the necessary delay and uncertainty of the counsel taking notes of the testimony and other

evidence that should be submitted to said two arbitrators, a stenographer should be employed, at the equal expense of said parties, who should, under an oath of accuracy first to be taken by him, take down the testimony; and it was stated by the counsel of your orator,
106 who moved or suggested the employment of such stenographer, as an additional reason for his employment, that, in case the said two arbitrators should be unable agree, the notes of the stenographer could be used before the three arbitrators, instead of being subjected to the trouble and expense of again calling the witnesses; that no objection was made to such suggestion, and it was tacitly acquiesced in by all parties; that, accordingly, such stenographer was employed, and attended and took down the evidence of all the subsequent meetings but the last, and wrote out and furnished to the counsel of each party a copy of the evidence.

And your orator further shows that at the next meeting of said two arbitrators, which was on the 16th day of the said month of February, the said parties each submitted written statements of their demands on the other; the original of that of your orator being in items and amounting to upwards of one hundred thousand dollars; but that of said Thomas, Porter, and Chew was general, without items, and without stating any specific sum demanded, as by reference to said claims, ready to be produced and shown, will more fully appear.

And your orator further shows that at the succeeding meeting of said arbitrators, between thirty-five and forty witnesses were examined, and the testimony of each, except two or three examined at the last meeting, taken down by said stenographer and copied as aforesaid; that the evidence thus copied by said stenographer covers between four hundred and five hundred pages of ordinary manuscript, and, with the numerous volumes of railroad statistics and reports on the operations of railroads in this country, would require days, if not weeks, of diligent and persevering labor to read and intelligibly comprehend.

And your orator further shows that at least four-fifths of all the printed matter, and nearly, if not quite, in that ratio of all the written exhibits offered in evidence to said arbitrators—amounting to hundreds of pages—were offered and read in evidence by and on the part of your orator; and that a diligent and fair reading and study of the printed matter offered and read in evidence to said arbitrators, as aforesaid, was and is absolutely essential to an intelligent or proper comprehension of the merits of the matters in difference submitted to said arbitrators as aforesaid.

And your orator further shows that the counsel of your orator, in conducting the proceedings before said arbitrators, were Messrs. A. Browning and John T. Nixon, and that the counsel of said Thomas, Porter, and Chew were the Attorney-General Robeson and P. L. Voorhees, esq.; that in the said agreement to submit written briefs or arguments to said arbitrators, as aforesaid, nothing was said or intimated that counsel of either party should or might have his or their arguments printed, but, on the contrary, the fair meaning and intent of the agreement was, that the arguments would be submitted in manuscript; that, in accordance with the said agreement, as understood by the said counsel of your orator, they each submitted and had delivered to said arbitrator, Henry F. Kenney, at the time appointed as aforesaid, a manuscript argument, on the part of your orator; and also, at the same time, all the written and printed exhibits and a copy of said oral testimony as written out by said stenographer; but the counsel of said Thomas, Porter, and Chew joined in one argument, which they had secretly printed, and at or about the time when it was agreed as aforesaid, had

several copies of their printed argument, instead of the manuscript, delivered to the said arbitrator, Matthew Baird, for himself and for
107 distribution to his co-arbitrator and others; that one of the counsel of your orator, Mr. Browning, learning on the same day that said arguments were delivered to said arbitrators, but not until after his and Mr. Nixon's arguments had been delivered as aforesaid, that the counsel of the opposite party had had theirs printed and distributed as aforesaid, he at once procured his to be also printed and distributed, from his original draft of his argument which he had retained; but, being unable to procure any copy of Mr. Nixon's in time, his never was printed or distributed, except the single copy sent under seal to arbitrator Kenney as aforesaid; so that, so far as your orator knows, and believes, and charges, the said argument of Mr. Nixon was never seen or read, except by said arbitrator Kenney.

And your orator further showeth that after the said arguments had been delivered to said two arbitrators as aforesaid, your orator had no communion or intercourse with said arbitrators; nor was your orator notified or advised by them of an inability to agree on an award, and being advised by counsel that, if said two arbitrators should fail to agree and should select a third arbitrator to join with them, according to the power conferred upon them as aforesaid, your orator would have to be notified of such failure and selection of a third arbitrator, who would have to be sworn according to the provisions of the statute of this State, and that there, then, would have to be a rehearing upon notice to both parties before the three arbitrators; but that, as the testimony of the witnesses had been taken by a stenographer as aforesaid, he supposed that all parties would agree that that should be read to the arbitrators by counsel, instead of recalling those witnesses again, and that thus the time and labor of a rehearing would or could be materially lessened; but that, without such notice to parties and time and place appointed for a rehearing, no proceeding could, lawfully, be had before a third arbitrator, nor any of the evidence which had been taken as aforesaid used, unless by consent of parties; and that, therefore, your orator would either have to be notified of a failure by said two arbitrators and the selection of a third, in time to go into a rehearing, or else, if the said two arbitrators should not agree upon an award, within the aforesaid time limited for the making of it, no award could be made; and your orator, relying on said advice—believing it then and still to be correct—waited a notification of disagreement and selection of a third arbitrator, or the alternative result of an award if said two arbitrators should agree, or no award if they should fail to agree.

And your orator further showeth that no notice whatever was ever given by said arbitrators to your orator of their inability to agree, or of their selection of a third arbitrator, or of any meeting by them alone or in connection with a third person, nor, so far as your orator knows and believes, to either of your orator's counsel; but, on the contrary, all proceedings by said two arbitrators, after the closing of said testimony, were secret and without any notice to your orators, and conducted in said city of Philadelphia.

And your orator further showeth that on the twenty-fourth day of June last, one of the counsel of your orator, Mr. Browning, was casually, as it seemed to him, and yet in a way which excited his apprehensions of a secret movement, informed by one of the counsel of said Thomas, Porter and Chew that he had learned that said two arbitrators would not agree, and requested by said counsel to join him in framing the proper form of an appointment of a third arbitrator; but the said

108 counsel of your orator declined to take any part in the appointment of a third arbitrator, or in the proceedings of the said two arbitrators, until notified by them of their inability to agree and of their selection of a third arbitrator; and that the said counsel of said Thomas, Porter and Chew not stating or intimating that he was acting under any notice or direct information from said arbitrators, or that he knew who or whether any third arbitrator had been selected, nothing further occurred between said counsel than the suggestion of agreeing to the form of an appointment by the one, and the declining by the other, to aid in making said form in blank.

And your orator further showeth that the said counsel of your orator, having his suspicion excited by the character of the suggestion made to him as aforesaid, and the manner of making it, he at once gave information to your orator of what had thus occurred, and directed your orator to have inquiry made what, if anything, was being done by said arbitrators; but it was not until the evening of Saturday, the twenty-sixth day of June last, four days only before said award was to be made, if at all, that your orator succeeded in ascertaining in a reliable, but yet indefinite and confidential way, that said arbitrators had failed to agree, and had selected a third arbitrator by the name of R. R. Wilder, and that they had agreed upon and appointed eleven and a half o'clock in the forenoon of the succeeding Monday, the twenty-eighth of June, to hold their first meeting at the office of the said Henry F. Kenney (one of said arbitrators), at the corner of Washington avenue and Broad street, in the said city of Philadelphia; and that it had been agreed by said arbitrators that the appointment of said Wilder, and their said meeting appointed for said Monday and all subsequent ones, should be private, without notice to the parties, and without hearing or evidence, except from the statements of said two arbitrators, and examination of the copies of oral testimony taken as aforesaid and reduced to writing by said stenographer, and from said written and printed exhibits; but the informant of your orator was unable to understand or learn who said Wilder was, other than his name (and that inaccurately, as it is since ascertained that the middle initial of his name is A instead of R), or whether he had been then, or was intended to be sworn as an arbitrator.

And your orator further showeth that in the afternoon of Monday, the twenty-eighth day of June, your orator, still without any notice other than rumor of the proceedings of said arbitrators, learned that they had had a secret meeting at the said office of Henry F. Kenney, at the corner of said Washington avenue and Broad street, in the city of Philadelphia, and after continuing in session about two or three hours at most, had adjourned to hold another secret meeting at the office of the said arbitrator, Matthew Baird, in said city of Philadelphia, also on Broad street, but about a mile from the office of said Henry F. Kenney; but your orator was yet unable to ascertain how or when said Wilder had been appointed a third arbitrator, or how or when he had been sworn as arbitrator, if he had been sworn at all.

And your orator further showeth that in the forenoon, or about noon, of Tuesday, the twenty-ninth day of June, your orator learned that said three arbitrators were again in secret session—at least so far as your orator was concerned—at the said office of Matthew Baird, and that it was their intention, or the intention of the said Matthew Baird and Wilder, to proceed without notice to your orator, secretly, in said
109 city of Philadelphia, and without evidence or any hearing of the parties, or opportunity or permission to be heard, but under a se-

cret agreement not to give either party notice, or permit them to be present; and without the possibility, so far as said Wilder was concerned, legally or rationally to know or comprehend the testimony which had been previously submitted to said two arbitrators, and make an award; that being thus advised, the counsel of your orator, in behalf of your orator, hastily drew up and caused to be served on said three arbitrators, whilst they were holding their said secret session at the said office of Matthew Baird, a protest against their proceedings as "irregular, unusual, partial, unauthorized, illegal, and void"; that learning from the report of the conduct of the said Matthew Baird and Wilder, when said protest was served, that they would disregard it, your orator in a hasty manner procured a bill of complaint against the said arbitrators, and said Thomas, Porter, and Chew, to be drawn and exhibited in the supreme court of Pennsylvania, sitting in equity, praying for a writ of injunction restraining said arbitrators from all other proceedings as arbitrators as aforesaid, and from making, signing, or delivering any award or paper purporting to be an award in the premises aforesaid; that upon the filing of said bill and the affidavits annexed thereto, a writ of injunction was by said supreme court, sitting as aforesaid, allowed and issued according to the prayer of said bill; and at about fifteen minutes before four o'clock in the afternoon of the said twenty-ninth day of June, served on the said Matthew Baird and Wilder, while they were yet in secret session at the said office of Matthew Baird; and about fifteen minutes thereafter on the said Henry F. Kenney, who was at the time of service at his own office, at the aforesaid corner of Washington avenue and Broad street, in said city.

And your orator further shows unto your honor that when the said writ of injunction was served as aforesaid, no award had been made or drawn or signed by said arbitrators, or any of them; nor had there been any adjournment of the said arbitrators to any other time or place, or any arrangement or agreement between the said arbitrators to meet and confer together on any award that might be thereafter drawn or agreed to, by said Matthew Baird and Wilder, if they should agree to an award; nor was any award, or any paper or writing purporting to be an award, ever in anywise presented to said Henry F. Kenney for his concurrence, consideration, or rejection, or for any other purpose; nor were the said three arbitrators at any time together, by appointment or otherwise, for the consideration of any award whatever in the premises, after the service of said writ of injunction on them as aforesaid.

And your orator further showeth that, as your orator is informed and believes, and therefore charges, on the second day of July, after the time limited by said article of submission for the making an award, and while said writ of injunction was still in full force and undissolved, the said Matthew Baird and Wilder (whose name your orator has since learned to be Rufus A. Wilder), and without any meeting, conference, or consultation with the said Henry F. Kenney, and without notice to, or knowledge thereof on his part, drew up, or procured to be drawn up, a paper or writing, purporting to be an award by them, as two of said arbitrators, of and concerning the matters in difference aforesaid; and falsely and fraudulently dated said award on the twenty-ninth day of June, to make it appear to have been made by them on that day, and therefore within the time limited by said article of submission, and, also, before the service of said writ of injunction as aforesaid, and then signed said award, and by a letter, also falsely and fraudulently dated on the thirtieth day of said month of June, but mailed at Philadelphia on the second day of July, eighteen hundred

and sixty-nine, notified your orator that they had made an award, and that it was ready for delivery to the parties to said submission; which letter, thus mailed and postmarked on said the second day of July, was directed to Thomas Jones Yorke, the president of your orator, and was, by due course of mail, received by him on the morning of the third day of said month of July, at his office in Camden.

And your orator further showeth that afterward, on the seventh day of said month of July, a writing purporting to be an award made by the said Matthew Baird and Rufus A. Wilder, as arbitrators as aforesaid, under and by virtue of said articles of submission, bearing date the twenty-ninth day of June, A. D. eighteen hundred and sixty-nine, and purporting to have been made and signed by them on that day, was delivered by two men to George J. Robbins, the secretary and treasurer of your orator, at the office of your orator in said city of Camden; that in and by said award or writing purporting to be an award of the said Matthew Baird and Rufus A. Wilder, it is, among other things, recited that the said Matthew Baird and Henry F. Kenney, being unable to agree upon an award, they, on the sixteenth day of June last, nominated and appointed the said Rufus A. Wilder as umpire or third arbitrator, to act with them in said submission; and that said Rufus, having been first duly sworn faithfully and fairly to hear and examine said matters in difference, and make a just and true award according to the best of his skill and understanding, did as umpire or third arbitrator join with the said Henry F. Kenney and Matthew Baird, arbitrators as aforesaid, and proceed to ascertain and determine upon all the matters in difference, and all the damages, if any, that either party to said submission should pay to the other for or on account of the said matters in difference submitted as aforesaid; and having heard and examined the allegations and proofs of the said parties and considered the same, that they, the said arbitrators (meaning the said Matthew Baird and Rufus A. Wilder), did thereby make and publish their award in writing of and concerning the matters in the said submission contained and to the said arbitrators submitted as aforesaid; and that they did determine and award that the value of the said unexpired term (meaning an unexpired term which the said Thomas, Porter, and Chew claimed they had in the aforesaid railroad and its equipments, from Glassboro to Milleville aforesaid) and the loss and damage sustained by reason of the termination thereof, to and by the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, over and above all the claims made by your orator for not keeping the said railroad in proper condition and repair, and for all other claims made and insisted upon by your orator before them (meaning the said Baird and Wilder), was and is the sum of one hundred and fifty-nine thousand and four hundred and thirty-seven dollars and seven cents; and that they did determine and award that your orator should pay to the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew the said sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents, on or before the twenty-ninth day of this present month of July (being the twenty-ninth day of July then next ensuing the date of said award), and that they did determine and award that the said sum was, or should be, in full satisfaction of all demands and controversies by and between the
111 said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew and your orator; and that all controversies and demands whatsoever between them (said Thomas, Porter, and Chew) and your orator, to the day of the date of the aforesaid submission, should cease and determine; and that they did determine and award that the moneys which

had been paid by the said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, to the said Richard D. Wood, under the provisions of the aforesaid lease or agreement (meaning the aforesaid agreement between the said Thomas, Porter, and Chew, and said Richard D. Wood, with the said "Millville and Glassboro Railroad Company," bearing date the eighth day of October, eighteen hundred and sixty-three), and known and designated as the renewal fund, and claimed by your orator, should be paid to the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew; and that your orator should release to them, said Thomas, Porter, and Chew, all claim for the same; and that your orator should pay on demand the sum of seventy-five dollars, being the one-half the fees and expenses of said Rufus A. Wilder, the arbitrator chosen as aforesaid; and that all other costs and charges of either party to said submission should be borne and paid by the party incurring the same; as by reference to said award or writing purporting to be an award, signed or purporting to be signed by said Matthew Baird and Rufus A. Wilder, and delivered to the said secretary and treasurer of your orator as aforesaid, and now in the possession of your orator, will appear; and to which for greater certainty your orator prays leave to refer; and a copy of which your orator also annexes hereto, and prays that it may be taken and considered as a part of this bill.

And your orator further shows and charges that the said Rufus A. Wilder was never legally or properly appointed or selected as a third arbitrator to join the said Matthew Baird and Henry F. Kenney in the said submission to them, and if sworn at all to act as such arbitrator, he was not legally and properly sworn, but secretly and fraudulently, by the contrivance and procurement of the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, or one of them, with notice and knowledge thereof to them or their counsel, but without notice or knowledge thereof to your orator or the counsel of your orator; and that if appointed at all by the said Henry F. Kenney and Matthew Baird as such third arbitrator, he was not appointed until after he had been sworn as aforesaid, and not until the twenty-eighth day of June, eighteen hundred and sixty-nine, and after he and the said Matthew Baird, without the knowledge or consent, and contrary to the wishes of the said Henry F. Kenney, had had secret and private meetings, considerations, and consultations of and concerning the matters in difference mentioned and referred to in said articles of submission, and the whole of said matters, without evidence, and without any pretence of evidence, except only, perhaps, a copy of the aforesaid testimony taken by said stenographer, furnished by said Matthew Baird alone, and such documentary evidence only as had been offered in evidence by or on the part of the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, and without notice or knowledge to your orator, or the counsel of your orator; and that at such private meetings, considerations, and consultations, the ex parte statements of the said Matthew Baird and his views and opinions were urged on the consideration of the said Rufus A. Wilder, whose opinion touching said matters in difference was thereby made up and formed, without any evidence, or any pretence of evidence, except a copy of said testimony which had been delivered as aforesaid to the said Matthew Baird, and the exhibits on the part of the said Thomas, Porter, and Chew, but without any of the exhibits on the part of your orator; and your orator also expressly charges that at no time, either before or after the aforesaid first meeting held by said three arbitrators at the office of the said Henry F. Kenney on the twenty-eighth

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day of June last, was any part of the written and documentary evidence which had been offered in evidence as aforesaid, to said Baird and Kenney, on the part of your orator, submitted to, seen, read, or considered by the said Rufus A. Wilder; nor at the said first meeting of said arbitrators, attended by said Henry F. Kenney, was any part of the said oral testimony, taken by said stenographer as aforesaid, read over or considered by said Rufus A. Wilder; but, on the contrary, the said Matthew Baird and Rufus A. Wilder, although urged thereto by said Henry F. Kenney, refused to go into any actual or formal reading or examination of the said oral testimony, or any reading or examination of the documentary evidence which had been offered as aforesaid on the part of your orator, on the ground that there was not time sufficient to do so, and that said Rufus A. Wilder had already become sufficiently acquainted with said matters in difference, from the evidence and information which had been furnished and given to him by the said Matthew Baird before the said first meeting of said three arbitrators.

And your orator further charges that the said award, or writing purporting to be an award, made by the said Matthew Baird and Rufus A. Wilder was never seen, submitted, or considered by the said Henry F. Kenney, or in any way presented to him by said Baird and Wilder for consideration or notice, or opportunity given or afforded to him to consider and consult with said Baird and Wilder touching said award, after it had been drawn or agreed on by said Baird and Wilder; but that the same was made, as aforesaid, without notice to or knowledge of your orator, without the knowledge of the said Henry F. Kenney that it was about to be made or had been drawn, until after it had been drawn and signed by the said Baird and Wilder; and your orator further charges that said award was not made and ready for delivery to the said parties to the said submission until after the said first day of July last; that if drawn and signed by the said Baird and Wilder on or before that day (which your orator, speaking from information and belief, denies), yet that no notice thereof was given to your orator until after the said first day of July, and that said award never was in the State of New Jersey, where alone it could be ready for delivery to your orator, until the seventh day of July, on which day it was delivered to the said secretary and treasurer of your orator as aforesaid, not by the said Baird and Wilder, or either of them, but by two persons who were strangers to said secretary and treasurer; and your orator further charges the proceedings of the said arbitrators, particularly of the said two arbitrators, Matthew Baird and Rufus A. Wilder, being secret, without notice to or knowledge of your orator, without any legal and competent testimony whatever, and only a portion of the evidence which had been submitted to the said Henry F. Kenney and Matthew Baird as aforesaid, and to the exclusion of your orator from being heard before them, as hereinbefore stated, were illegal, fraudulent, and void as against your orator; and that the said award is also fraudulent, illegal, and void, contrary to the honest truth and justice of the case, in disregard of the reliable testimony which had been submitted to said two arbitrators, Henry F. Kenney and Matthew Baird, as aforesaid, and that the same ought to be set aside, and all proceedings thereon restrained by this honorable court.

113 And your orator further showeth that in further verification of the illegal, inconsiderate, and fraudulent conduct of the said Matthew Baird and Rufus A. Wilder in the making of said award, or paper purporting to be an award, that all the evidence which had been submitted to the said arbitrators, Henry F. Kenney and Matthew Baird, on the part of your orator as aforesaid, including one copy of the oral tes-

timony taken by said stenographer, was in a box, closed up, in the office of the said Henry F. Kenney, at the time of the first meeting of said three arbitrators, and had not been seen, or opportunity offered to said Rufus A. Wilder to inspect before, and yet the said Matthew Baird and Rufus A. Wilder, although urged to it by said Henry F. Kenney, wholly and absolutely refused to look into, read, or in any way examine the said evidence, and the same never was in any way read, examined, or considered by said Rufus A. Wilder, who therefore necessarily joined in said award without any legal, rational, or competent knowledge of a very large and reliable portion of the evidence which had been submitted and given in evidence as aforesaid, even admitting the evidence which had been written down and given in evidence as aforesaid to have been legal or competent evidence to be considered by said Rufus A. Wilder, without the presence or consent of your orator; your orator, however, expressly charging that it was not competent or legal evidence to be considered by said Rufus A. Wilder without such consent, and that no such consent ever was in any way given; and your orator also charges that the said written argument of your orator's counsel, John T. Nixon, never having been printed for the reasons aforesaid, never was seen, read, or considered at all by said Rufus A. Wilder, so that only a part of the allegations of your orator before said two arbitrators, Henry F. Kenney and Matthew Baird, were ever read or considered, or could have been read or considered, by said Rufus A. Wilder, even admitting the competency of using or reading said arguments by the said Rufus A. Wilder, as and for the arguments and allegations of said parties before him, your orator, however, also expressly charging that it was not competent to read or use said arguments before said Rufus A. Wilder without the consent of your orator thereto, which assent your orator charges and avers never was in any way given.

And your orator further shows that the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew threaten and intend to institute, or cause to be instituted, in a court of law an action or actions against your orator on the said award to recover the amount of the said sum of money therein awarded to be paid as aforesaid by your orator to them, and to sue for, collect, or receive from the executors of the last will and testament of the said Richard D. Wood the amount of said renewal fund which was in his hands, and which by said award is required to be paid to the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, instead of your orator—the said Richard D. Wood having recently died, leaving a last will and testament, which has been proved, and letters testamentary issued thereon to certain persons therein named and appointed executors thereof, and the said fund at the decease of the said Richard D. Wood being in his hands, and now in the hands of his executors; and that, as preparatory to the institution of such action or actions, the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, on this twenty-ninth day of July, eighteen hundred and sixty-
114 nine (it being the ultimate day which in and by said award is fixed for the payment of said moneys by your orator to them), called on Thomas Jones Yorke, esquire, the president of your orator, at his office in the said city of Camden, and made him a formal demand for the payment to them of the said sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents, which in and by said award is required to be paid by your orator to them on or before this day.

And your orator further shows that the said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, unless restrained by this hon-

orable court, will commence such action or actions for the recovery of said moneys, in some court or courts of common law, where your orator will be unable, by reason of the strictness of proceedings in such courts, to make defence to such actions, or, if able in part so to do, not in such full and ample manner as in this honorable court, where matters of this sort are more properly cognizable and relievable; and your orator, therefore, respectfully submits that the institution of such actions, or any action in a court of common law by said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew ought to be restrained by injunction from this honorable court.

All which actings and doings of the said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator. In tender consideration whereof, and forasmuch as your orator is without adequate remedy in the premises by the strict rules of the common law, and without the assistance of this honorable court, where matters of this sort are properly cognizable and relievable—

And to the end, therefore, that the said defendants, George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, and their confederates, when discovered, may, on their several and respective oaths or affirmations, if conscienciously scrupulous of taking an oath, full, true, distinct and perfect answer make to all and every the matters aforesaid, and that as fully as if the same were here again repeated, and they thereto particularly interrogated, paragraph by paragraph, and that they and each of them, their attorneys, solicitors, counselors and agents may be restrained from commencing or prosecuting any action or actions in a court of common law on said award, or to recover or enforce the payment of all or any of the said moneys therein or thereby awarded to be paid to them, or any action for the recovery of damages for the non-payment thereof; and that the said award may be set aside as illegal and fraudulent against your orator, and that your orator may have such further and other relief in the premises as the nature of the case may require, and may be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your orator, not only the State's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, and each and every of them, and their and each and every of their attorneys, solicitors, counselors and agents, strictly enjoining and commanding them and each and every of them from commencing, prosecuting, or in any wise proceeding in any court of common law, by suit or action on the said award, or for the recovery of the moneys in and by the said award ordered, directed, or required to be paid by your orator to the
115 said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, or by the said executors of the said last will and testament of said Richard D. Wood, deceased, or other person or persons having said renewal fund, mentioned and referred to in said award, and therein and thereby directed or required to be paid to the said George W. Thomas, Alfred L. Porter and Nathaniel F. Chew, or any action or actions for the recovery of damages for the non-payment of said moneys, but also the State's writ of subpœna, to be directed to the said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, therein and thereby commanding them and each of them, on a certain day and under a certain penalty therein to be expressed, personally to be and appear before your honor, in this honorable court, then and there to answer the premises, and to stand to, abide by and perform such order or decree as

to your honor shall seem meet and agreeable to equity and good conscience. And your orator will ever pray, &c.

A. BROWNING,
Solicitor for and of Counsel with Complainant.

The above bill of complaint of the West Jersey Railroad Company, complainant, against George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, the defendants therein mentioned, is hereby made, and the truths of the facts and averments contained therein verified under the common seal of said company, which the said complainant has, for that purpose, caused to be hereunto affixed and attested by the president of said company, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and sixty-nine.

Attest:
[L. S.]

T. JONES YORKE,
President West Jersey Railroad Company.

STATE OF NEW JERSEY,
County of Camden, ss:

Thomas Jones Yorke, being of full age, maketh oath and saith that he is, and for several years last past has been, the president of the West Jersey Railroad Company, and as such president has a full and accurate knowledge of transactions and affairs of said company; that he is also acquainted with the facts, averments, statements, and charges set forth and contained in the above bill of complaint by said company as complainant, against George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, defendants; and that the said facts, averments, statements and charges, so far as they relate to the acts and deeds of said company, or to this deponent as the president thereof, are true, and so far as they relate to the acts and deeds of any other person or persons, he, this deponent, believes them to be true; and especially is it true, as therein stated, that all the proceedings therein stated to have been taken by Henry F. Kenney and Matthew Baird, alone, in the selection and appointment of Rufus A. Wilder as a third arbitrator, as therein stated, and by said Henry, Matthew and Rufus, or by said Matthew and Rufus, after his said selection or appointment, were without any notice to or knowledge of said company, and without said company, by their counsel or otherwise, being present or being permitted to be present; that the first intimation or knowledge which the said company had of the making of the award, which in said bill is stated to have been
116 made by said Mathew Baird and Rufus Wilder, was a letter importing to be from them, bearing date the thirtieth day of June last, directed and addressed to this deponent as the president of said company, at Camden; that the said letter was in an envelope, postmarked at the city of Philadelphia on the second day of this present month of July, and was received by due course of mail at the city of Camden by this deponent in the morning of the next day; and that on this twenty-ninth day of July the said defendants made formal demand of this deponent as the president of said company, at the office of this deponent in said city of Camden, for the payment of the sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and four cents, mentioned in said award, which, as this deponent understood, was for the purpose and as preparatory to the institution of legal proceedings by them for the recovery of said money, if not paid; and that this deponent declined to pay said money, or any part thereof, to them.

T. JONES YORKE.

Sworn and subscribed, at Camden, this twenty-ninth day of March,* A. D. 1869, before me, one of the masters in chancery of New Jersey.

CHAS. P. STRATTON, *M. C.*

STATE OF NEW JERSEY,
County of Camden, ss:

William J. Sewell, of the city of Camden, New Jersey, being of full age, maketh oath and saith that on Saturday, the twenty-ninth† day of June last, this deponent, at the instance of Abraham Browning, the counsel of the West Jersey Railroad Company, the complainant mentioned in the above bill of complaint of said company as complainant against George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew as defendants, called on Henry F. Kenney to ascertain the truth or falsity of the rumors which had then become current, as to the appointment by him and Matthew Baird of a third arbitrator to act with them under the submission mentioned in said bill, which this deponent has heard read, and was informed by said Henry F. Kenney, on making such inquiry of him, that they had appointed a third arbitrator, whose name was R. R. Wilder, and that an arrangement had been made to hold the first meeting under such appointment at his, said Henry F. Kenney's office, in the city of Philadelphia, at half past eleven o'clock in the forenoon of the next Monday, which was on the twenty-eighth day of said month of June; that upon this deponent asking the said Henry F. Kenney why notice of such appointment and meeting had not been given to the said West Jersey Railroad Company or their counsel, he said because it had been agreed by the arbitrators, meaning himself and said Matthew Baird, as this deponent supposed, that no such notice should be given to either party, or words to that effect; that this deponent, in the evening of the same day, on returning to Camden, advised the said counsel of what Mr. Kenney had said.

W. J. SEWELL.

Sworn and subscribed, at Camden, this twenty-ninth day of July, A. D. 1869, before me, one of the masters in chancery of New Jersey.

CHAS. P. STRATTON, *M. C.*

117 *Copy of submission.*

Articles of agreement made and entered into the twenty-first day of December, A. D. 1868, between George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of Millville, N. J., of the first part, and The West Jersey Railroad Company, a corporation under the laws of New Jersey, of the second part.

Whereas, in and by a certain agreement bearing date the 8th of October, 1863, "The Millville and Glassboro Railroad Company," a corporation under the laws of New Jersey, then owning a railroad from, at, or near Glassboro, in the county of Gloucester, at Millville, in the county of Cumberland, in New Jersey (a distance of about twenty-two miles), with certain buildings, machine-shops, offices, stations, rolling-stock, machinery, implements, and materials on and along the line thereof, particularly enumerated in a schedule marked A, annexed to said agreement, in consideration of certain covenants, in said agreement specified, to be performed by and on the part of the said George W. Thomas,

* NOTE.—Clerical error—should be July
† NOTE.—Should be 26th.

Alfred S. Porter, and Nathaniel F. Chew, did lease the said railroads, buildings, machine-shops, offices, stations, rolling-stock, machinery, implements, and materials to them, the said George, Alfred, and Nathaniel, for the term of twenty years, viz, from the first day of August, 1863, to the first day of August, 1883, but with a proviso or provision in said agreement contained, to the effect that the said Millville and Glassboro Railroad Company might thereafter at any time during said term terminate the same by giving to said George, Alfred, and Nathaniel three months' notice of their intention so to terminate the same; but also with a further provision that if the said term should be so terminated, that the said George, Alfred, and Nathaniel might have the value of their said unexpired term, and the damage arising to them by reason of such termination, determined by arbitration, in a mode provided for in said agreement; as by reference to said agreement will more fully and accurately appear, and to which, for greater certainty, the said parties hereto refer.

And whereas, in and by the aforesaid agreement, leasing said railroad and its appurtenances to the said George, Alfred, and Nathaniel, they did, among other things, covenant with the said "The Millville and Glassboro Railroad Company," that they would, at their own cost, maintain the said railroad and rolling-stock thereof in their then good working condition, and, on the termination of their said term, would surrender the same, and all other property held by them under the said agreement, in good order and repair, as by reference to said agreement will more fully appear.

And whereas the said Millville and Glassboro Railroad Company, by notice as aforesaid, terminated the said term on the first day of April, 1868, and afterwards, to wit, on the same first day of April, in pursuance of a certain contract theretofore entered between the said The Millville and Glassboro Railroad Company and the said West Jersey Railroad Company, and of a certain act of the legislature of New Jersey, confirming said contract, approved March 18th, 1868, the said The Millville and Glassboro Railroad Company, by indenture bearing date the said first day of April, 1868, assigned all their corporate powers, franchises, and privileges, and all their property and assets, to the said The West Jersey Railroad Company, as by reference to said contract, enactment, and indenture will more fully appear, and to which, for greater certainty, the parties hereto refer.

118 And whereas, in and by said enactment it is, among other things, provided that on making the aforesaid assignment of the corporate powers, franchises, privileges, property, and assets to the said The West Jersey Railroad Company, as aforesaid, the same should be valid and effectual to convey and transfer the said powers, franchises, and property to and vest them in that company, but subject to all the debts, liabilities, and obligations of the said The Millville and Glassboro Railroad Company, as by reference to said enactment will also more fully appear.

And whereas the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, party of the first part hereto, claim that their aforesaid unexpired term was of considerable value to them, and that they have sustained loss and damage by the aforesaid termination thereof, which the said The West Jersey Railroad Company, party of the second part hereto, are liable to pay; and the said The West Jersey Railroad Company, on the other hand, claim that the said George, Alfred, and Nathaniel failed to keep and surrender said leased premises in

proper condition and repair, and are liable therefor to the said The West Jersey Railroad Company.

And whereas neither of the parties hereto admit such or any other liability to the other, but are yet willing and have agreed to submit to arbitration, as hereinafter stated, all matters in difference between them arising out of or in anywise resulting from the covenants and provisions contained in the aforesaid agreement demising the said railroad and other premises, and the said termination of the term thereof, and said subsequent assignment, to the said The West Jersey Railroad Company:

Now, this article witnesseth that the said parties hereto have covenanted and agreed each with the other to submit, and hereby do submit, all the aforesaid matters in difference between them that have arisen, or that can or may in anywise arise out of or result from the covenants and provisions contained in the aforesaid agreement, demising the said railroad and other premises, to the award and final determination of Henry F. Kenney and Matthew Baird, of the city of Philadelphia, in the State of Pennsylvania, arbitrators by them agreed upon and chosen; and do further covenant and agree that said arbitrators, having taken upon themselves the burden of this submission, shall have full power and authority to ascertain and determine upon all the said matters in difference, and all damages, if any, that either party should pay to the other for or on account of said matters in difference.

And they, the said parties hereto, have further covenanted and agreed each with the other, and hereby do further covenant and agree each with the other, to stand to, abide by, pay and perform the award of said arbitrators in the premises, so that the same be made in writing, signed by them, and ready for delivery to the parties on or before the first day of July next after the day of the date hereof.

And the said parties hereto have further covenanted and agreed each with the other, and hereby do further covenant and agree each with the other, that if the said arbitrators should be unable to agree upon an award, then they, said arbitrators, may themselves select some third person as umpire, who as a third arbitrator shall join them in the submission aforesaid, and that the said three arbitrators, or any two of them, shall have full power and authority to ascertain and determine upon all the said matters in difference, and that their award, or
119 the award of any two of them, in the premises aforesaid, made in writing and signed by any two of them, and ready for delivery as aforesaid on or before the said first day of July next, shall be binding and conclusive upon the said parties hereto, and they, said parties, also covenant and agree each with the other to stand to, abide by, pay, and perform the same.

And the said parties hereto have further covenanted and agreed each with the other, and hereby do further covenant and agree each with the other, that the submission is and shall be deemed and considered irrevocable; and that if either party hereto shall revoke or attempt to revoke the same, that such revocation, or attempted revocation, shall be a full and absolute release, acquittance and discharge by the party so revoking or attempting to revoke this submission to the other party hereto, of and from all action and actions and causes of action, and of and from all claims and demands in law or equity, for or on account of all or any of the matters referred to as aforesaid to said arbitrators; and that in addition to said release, acquittance, and discharge, the said party so revoking or attempting to revoke this submission shall forfeit

and pay to the other party hereto, as fixed and liquidated damages, the sum of fifty thousand dollars.

In witness whereof, on the day and year first above written, the said party of the first part have hereunto set their hands and seals, and the said party of the second part have hereunto set their common seal and attested the same by their president and secretary.

(Signed) GEO. W. THOMAS. [L. S.]
A. S. PORTER. [L. S.]
N. F. CHEW. [L. S.]
T. JONES YORKE, [L. S.]
President West Jersey Railroad Company.
GEO. J. ROBBINS, [L. S.]
Secretary West Jersey Railroad Company.

Signed, sealed, and delivered in the presence of, as to the signatures of Geo. W. Thomas, A. S. Porter, and F. Chew—
PETER L. VOORHEES.

And as to the West Jersey Railroad Company, in presence of—
JOS. W. ALLEN.

STATE OF NEW JERSEY,
Camden County, ss:

Henry F. Kenney and Matthew Baird, of the city of Philadelphia, in the State of Pennsylvania, the arbitrators mentioned in the above articles of agreement, being severally duly sworn, on their solemn oath say that they will faithfully and fairly hear and examine the matters in difference between the said parties to the said articles of agreement, and thereby submitted to them, these deponents, and make a just and true award, according to the best of their skill and understanding.

(Signed) H. F. KENNEY. [L. S.]
M. BAIRD. [L. S.]

Sworn and subscribed, at the city of Camden, this twenty-first day of January, A. D. one thousand eight hundred and sixty-nine, before me, one of the masters in chancery of New Jersey.
CHARLES P. STRATTON, *M. C.*

120 *Copy of lease.*

Contract and agreement made and entered into this eighth day of October, A. D. 1863, between the Millville and Glassboro Railroad Company, of the first part, and George W. Thomas, Alfred S. Porter and N. Frank Chew, of Millville, New Jersey, of the second part, and Richard D. Wood, of Philadelphia, and his heirs, executors, and administrators, of the third part.

Whereas, at a meeting of the stockholders of the Millville and Glassboro Railroad Company, held at Millville, the fourteenth day of July, A. D. 1863, it was proposed to lease the said railroad, and it was then judged best to refer the same to the next meeting of the board of directors, with power to act, and at the next meeting of that board, held on the same day and at the same place, the following resolution was offered, to wit: *Resolved*, That Thomas H. Whitney, Ferdinand F. Sharp, and Richard D. Wood be appointed an executive committee, to conduct the general business of this company, and that they be empowered to lease the road in perpetuity, or for one or more years, as they may deem best

for the interest of the concern, taking proper care to contract with responsible lessees.

On motion it was resolved to amend the above resolution, so that any contract made by the therein named executive committee should be submitted to the directors and be by them approved, before said contract should be binding upon this company. On motion the above resolution as amended was adopted.

And whereas, in pursuance of this authority, and of all other authority then in that behalf enabling, the party of the first part is desirous to contract for the transportation of freight, mails and passengers over their railroad, and the party of the second part has proposed to them to undertake the same, upon the terms and as hereinafter mentioned, and to furnish all the necessary rolling stock, labor and materials, and also to perform and fulfil all and singular the duties and obligations hereinafter mentioned and assumed, which proposition the party of the first part has agreed to accept, upon the conditions and provisions hereinafter contained on the part of and by the party of the second part to be observed and kept.

Now, this contract and agreement witnesseth—

First. That the party of the first part does hereby, (and for the purpose of enabling the party of the second part to fulfil this contract,) entrust to their possession and care, and subject to the provisions of this contract, all the roadway and superstructure, buildings, machine shops, offices, stations, rolling stock, machinery, implements and materials on and along the line of said railroad, of which a schedule is hereto annexed, marked A.

And the party of the second party hereby acknowledges the receipt of the said property for the purposes aforesaid, and that the said property has been duly valued and appraised, and it is agreed that the valuation affixed to each article thereof in the said schedule is the just and true value thereof on the first day of August, A. D. 1863, being the time of the delivery of the property therein described to the party of the second part.

Second. That the party of the second part shall and will provide all the needful cars and engines for transporting, and will duly transport all passengers, mails, and freight, whether through or local, offering or delivered to them to be transported, and shall and will fulfil all the duties and liabilities of the party of the first part to the public.

121 Third. That the party of the second part shall and will at their own cost maintain the roadway or superstructure of the said railroad and the rolling stock thereof in their present good working condition; and shall and will at their own cost defray all the expenses and charges of running said railroad, and the expense of all current renewals or repairs; and shall and will in pursuance of these provisions keep and pay all needful and prudent persons for performing the labor necessary to fulfil their obligations as herein expressed, and shall and will furnish at their own expense all necessary materials, including fuel, oil, tallow, and waste, and pay all water rents. And the party of the second part shall and will at all times indemnify and save harmless the party of the first part, and their property, for, from, and against all loss, outlay, cost, and damage for or by reason of any labor or material already or at any time hereafter so done or furnished, and from and against the claim of any person or persons therefor.

Fourth. And the party of the second part does hereby assume and take upon themselves all loss, cost, and damage of every nature, which may result to persons or property by reason of any matter or thing

connected with this contract, and done or omitted by them thereunder, but not for any loss, cost, or damage incurred by act of God, or by act of the public enemies.

Fifth. That the party of the second part shall and will at their own expense forthwith effect full and sufficient insurances in the name of the party of the first part, and for their interest, against damages or loss by fire upon the station house at Millville, and the engine houses at the same place, and the engine house at Glassboro, and shall and will keep the same insured during the continuance of this contract, or until the said buildings shall or may at their cost have been replaced by others of equal or greater value as hereinafter provided, in which case the new buildings shall and will be insured in like manner by the party of the second part, to the full value of the buildings removed to make place for the same, and the value of said buildings is ascertained in the schedule hereto annexed, marked B.

Sixth. That the party of the second part shall and will, whenever required so to do by a resolution of the board of directors of the railroad company, party of the first part, forthwith discharge from their service and employ any person or persons employed under or in pursuance of this contract whom the party of the first part may desire to have discharged.

Seventh. That the party of the second part shall and will at all times carry from point to point along the said road, in the regular trains running thereon, the directors and officers of said railroad, and of the West Jersey Railroad, and of the Cape May and Millville Railroad, free of charge, and also such other persons as the laws of New Jersey require so to be carried.

Eighth. That the party of the second part shall and will from time to time at their own expense place upon the said railroad, in addition to the said rolling stock described in the schedule hereto annexed, such further rolling stock as may be necessary to transport all the passengers, mails, and freight offering or delivered to them to be transported. And shall further have power at their own cost and expense, and at such times and places as they may deem most suitable for fulfilling the purposes of this contract (provided such places shall be within the limits of property belonging to the party of the first part, and the plan thereof be
122 first approved by the board of directors appointed by the said party of the first part), to erect buildings for station houses, engine houses, tool shops, wood sheds, and water tanks, and to lay side tracks, switches, and turn-outs. But if in pursuance of this provision the party of the second part shall substitute any new in the place of any old buildings or other property, the value of the new buildings or property shall be equal to or greater than the value of the old at the date of this contract; and at the termination of this contract the value of the old buildings or property shall be deducted from the value of the new, in making the appraisement under which the parties hereto are to perfect their settlement at the time of such termination, as does hereinafter more fully appear.

Ninth. That the party of the second part shall and will collect all the tolls, charges and earnings due from the transportation, mails and freight over the said road, and all or any other sum or sums due upon property of said road, entrusted to them by this contract, and shall and will pay one-half of the gross sum thus collected to the party of the first part, in quarterly installments, upon the first days of November, February, May, and August, beginning November first, A. D. 1863.

Tenth. That the party of the second part shall and will, from and out

of the one-half of the gross sum so collected as aforesaid, which is reserved to themselves, pay the yearly sum of ten thousand dollars, in monthly installments, beginning on the first day of September, A. D. 1863, into the hands of the party of the third part, subject to the provisions hereinafter expressed.

Eleventh. And it is mutually understood and agreed between the several parties hereto that the said yearly payment of ten thousand dollars shall remain in the hands of the party of the third part, as a fund to indemnify the party of the first part against any loss by deterioration of the roadway or superstructure, and of the rolling stock and buildings belonging or appurtenant thereto, below their present good working condition, or their value as expressed in the schedules hereto annexed, marked A and B, and against any loss incurred, or which may be incurred, by any matter or thing done or omitted, by the party of the second part, under or by reason of this contract.

And the party of the third part does hereby agree to become liable for, and chargeable with interest upon, all payments made to him upon account of said fund, at the rate of five per cent. per annum, and once in every year to add this interest, payable as thus agreed upon, to the principal of said fund, and to hold the moneys thus obtained subject to the covenants of this contract.

Twelfth. It is mutually agreed that the said fund shall be appropriated to lay new ties, to take the place of those destroyed by use or action of the weather, to replace the iron rails when worn unfit for use, or to renew the engines, cars, or other rolling stock, either by purchase as may from time to time become necessary, or by repairs necessary to maintain and perpetuate the said stock as described in schedule A. And no appropriation of said fund shall be made to defray running expenses nor current repairs, nor any loss caused by accident, except to indemnify the party of the first part as hereinafter provided.

And it is further mutually understood and agreed that in case of dispute between the parties hereto as to what are "current repairs," and what are "repairs necessary to maintain and perpetuate either roadway or rolling stock," such question or dispute shall be decided by some competent engineer, to be then or from time to time designated
123 or appointed by the party of the first part, to consider and decide upon such questions, and the decision of such engineer, when placed in writing, shall be conclusive, obligatory, and binding upon the parties hereto.

Thirteenth. And the said fund shall be further liable for and applied to idemnify and save harmless the party of the first part, for and from any loss on account of any matter or thing done or omitted by the party of the second part, or their agents, under or by reason of this contract, and against any and every breach of the party of the second part of any covenant herein contained.

Fourteenth. That no appropriation of said fund shall be made, except only by an order of the board of directors, appointed by the party of the first part. And upon the authority of such order the party of the third part shall pay the sum or sums, as required by said order, to the party of the second part, who shall and will apply the same to the purpose of the board of directors, and such payment shall relieve the party of the third part as to and from all liability or responsibility for or in respect to the money so paid.

Fifteenth. That in case the party of the second part shall at any time omit to pay the quarterly installments of one-half the gross sum received or obtained by them, under or in consequence of this contract,

for thirty days after such installment may have become due, as herein provided, or shall omit to pay the monthly installments of the ten thousand dollars as herein provided for fifteen days after the said installment may have become due, then without notice or demand the board of directors, at their option, shall have power forthwith to enter upon and take possession of said railroad, and all the rolling stock and buildings appurtenant or belonging thereto, and this contract shall be at an end, except so far as may be necessary to secure and idemnify the party of the first part against any loss or damage on account of any breach of this contract, by or on behalf of the party of the second part, committed prior to the termination thereof.

Sixteenth. That in case of the death of either of the persons of the party of the second part, before the expiration or sooner termination of this contract, then and in such case this contract shall be at an end, and the party of the first part shall forthwith enter upon and take possession of the said railroad, and the buildings and rolling stock belonging or appurtenant thereto or used thereon.

Seventeenth. That the party of the first part shall at any time have a right to put an end to this contract, and to all the rights thereby given, and retake possession of the railroad and rolling stock and buildings belonging or appurtenant thereto, upon three months' notice to that effect given to the party of the second part, or to either of the persons thereof. That upon the termination of this contract, according to the notice thus provided, if the party of the second part shall so desire, then the party of the first part shall and will appoint a competent and disinterested person, who, together with another competent and disinterested person, appointed by the party of the second part, shall consider and decide upon the value of this contract to the party of the second part, and the loss and damage incurred by and justly and equitably due to them by reason of such termination thereof. And in the event of any difference between the persons so appointed as aforesaid, as to the amount of damages justly and equitably due to the party of the second part, as aforesaid, then and in such case the said two persons shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or a majority of said three persons, if a third be chosen, shall be final, conclusive and binding upon the parties hereto.

124 Eighteenth. That at the expiration of this contract, or other sooner termination thereof, the party of the first part shall thereupon immediately take possession of all the property, real or personal, which the party of the second part may have in their custody, under or in pursuance of this contract. And the party of the second part shall and will promptly and quietly surrender the same in good order and repair. And it is mutually understood and agreed that, upon such taking possession, the property so taken possession of shall be valued and appraised by two competent and disinterested persons, one to be chosen by the party of the first part and the other by the party of the second part. And if the total valuation or appraisement shall be found to exceed the ascertained value of the property, whether real or personal, entrusted to the party of the second part, under or in pursuance of this contract, then and in such case the party of the first part shall and will thereupon pay to the party of the second part the amount of such excess. But if, upon such valuation, it shall be found that the said property has deteriorated in value to a sum less than that affixed thereto, at the time of entrusting the same as aforesaid, then and in such case the amount of such depreciation shall be paid by the party of the third part,

out of the fund placed in his hands, as hereinbefore provided. And if the amount of said fund shall not be sufficient to make good the amount of such depreciation, then and in such case the party of the second part shall and will make good the deficit.

Nineteenth. That the party of the third part shall and will, at the expiration or sooner termination of this contract, pay over to the party of the second part the fund placed in his hands as aforesaid, after having deducted therefrom all sums necessary to make good and defray any depreciation in the value of the railroad and rolling stock and buildings belonging or appurtenant thereto; and any loss by reason of any or every breach of any of the covenants on the part of the party of the second part herein contained, and loss by accident occurring on said railroad, or by anything done or omitted by the party of the second part, under or by reason of this contract.

Twentieth. And it is mutually understood and agreed between the parties hereto that if either the party of the first or second part shall refuse or omit, for the period of three days after they request so to do, to name a competent or disinterested person to make the valuation or appraisement herein provided, then and in such case, at the expiration of said three days, the party not making such default shall name another competent and disinterested person to act for such party in default, and the two persons then acting as aforesaid (whether named by the two parties as aforesaid, or by one party in default of the other as aforesaid), in the event of any difference between them as to the subject of such reference, shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third be chosen, shall be final, conclusive, and binding upon the parties hereto.

Twenty-first. And it is mutually understood and agreed that no claim arising from any parol understanding or agreement, whether past or to come, shall at any time be set up by either party hereto to effect the various covenants or agreements herein expressed, or to give any cause of action to either of the parties hereto.

Twenty-second. And it is mutually understood and agreed that this contract shall take effect, as though executed and binding, upon the first day of August, A. D. eighteen hundred and sixty-three, and shall
125 continue to be of effect and binding until the first day of August, eighteen hundred and eighty-three, unless otherwise sooner terminated, according to the various covenants and agreements herein contained.

In witness whereof the parties hereto have severally placed their hands and seals, the day and year first hereinbefore written.

THOS. H. WHITNEY, *Pres't.* [L. S.]
GEO. W. THOMAS. [L. S.]
N. F. CHEW. [L. S.]
A. S. PORTER. [L. S.]
RICHARD D. WOOD. [L. S.]

Sealed, signed, and delivered in presence of—
WM. D. KEMBLE, *Sec'y.* [L. S.]

Witness present:
WM. D. KEMBLE.

SCHEDULE A,

Drawn up and attached to the accompanying contract before the execution thereof.

One locomotive, the Millville, built 1863.	
One locomotive, the Thos. H. Whitney, built 1862.	
One locomotive, the Eagle, nearly worn out.	
Total value of the three	$22,000
Two passenger cars, valued at	3,000
Twenty eight-wheeled platform cars, valued at	10,000
Three box cars (new), at $700 each, valued at	2,100
Five four-wheeled platform cars, valued at	750
Six four-wheeled dirt cars, valued at	600
Two hand cars	100
	$38,550

Making the total value of the rolling stock entrusted to the party of the second part, under said contract, amount to thirty-eight thousand five hundred and fifty dollars.

SCHEDULE B.

Drawn up and attached to the accompanying contract before the execution thereof, giving the ascertained value of the buildings referred to in article fifth of the said contract, which the party of the second part are to keep insured, and to return at expiration or termination of said contract, at a value equal to or greater than that hereto annexed.

1. Engine-houses at Millville, now in course of construction by the party of the first part, value when completed, five thousand dollars	$5,000
2. Station-house and depot at Millville, value five hundred dollars	500
3. Engine-house at Glassboro, value one thousand dollars	1,000
Total value, six thousand five hundred dollars	$6,500

Copy of award.

Whereas heretofore, to wit, on the twenty-first day of December, A. D. 1868, certain articles of agreement under seal were made, concluded, and agreed upon between George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, of Millville, in the State of New Jersey, of the first part, and the West Jersey Railroad Company, a corporation under the laws of the State of New Jersey, of the second part, in which said agreement, after reciting, among other things, that whereas in and by
126 a certain agreement bearing date on the eighth day of October, eighteen hundred and sixty-three, the Millville and Glassboro' Railroad Company, owning a railroad from, at, or near Glassboro', in the county of Gloucester, to Millville, in the county of Cumberland, in New Jersey, with certain buildings, machine shops, offices, stations, rolling stock, machinery, implements, and materials, on and along the line thereof, in the consideration of certain covenants in said agreement specified to be performed by and on the part of said George

W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, did lease the said railroad, buildings, machine-shops, offices, stations, rolling-stock, machinery, implements, and materials, to them, the said George, Alfred, and Nathaniel, for the term of twenty years from the first day of August, eighteen hundred and sixty-three, to the first day of August, eighteen hundred and eighty-three, but with a proviso in said agreement contained to the effect that the said Millville and Glassboro' Railroad Company might thereafter, at any time during said term, terminate the same, by giving to the said George, Alfred, and Nathaniel three months' notice of their intention so to terminate the same, but also with the further provisions that if the said term should be so terminated, then the said George, Alfred, and Nathaniel might have the value of their said unexpired term, and the damages arising to them by reason of such termination determined by arbitration in a mode provided for in said agreement;

And whereas in and by the aforesaid agreement leasing said railroad and its appurtenances to the said George, Alfred and Nathaniel, they did, among other things, covenant with the said Millville and Glassboro Railroad Company that they would, at their own cost, maintain the said railroad and rolling stock thereof in their then good working condition, and on the termination of the said term would surrender the same, and all other property held by them under said agreement, in good order and repair;

And that whereas the said Millville and Glassboro Railroad Company, by notice as aforesaid, terminated said term on the first day of April, eighteen hundred and sixty-eight, and afterwards, on the same first day of April, eighteen hundred and sixty-eight, in pursuance of a certain contract theretofore entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, and of a certain act of the legislature of New Jersey confirming said contract, approved on the eighteenth day of March, eighteen hundred and sixty-eight, the said Millville and Glassboro Railroad Company, by indenture bearing date the said first day of April, assigned all their corporate powers, franchises and privileges, and all their property and assets, to the said the West Jersey Railroad Company; and that whereas in and by said enactment it is among other things provided that upon making the aforesaid assignment of the corporate powers, franchises, privileges, property, and assets to the said the West Jersey Railroad Company as aforesaid, the same should be valid and effectual to convey and transfer the said powers, franchises, and property to and vest them in that company, but subject to all the debts, liabilities and obligations of the said the Millville and Glassboro Railroad Company;

And whereas the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, party of the first part to said agreement, claiming that their aforesaid unexpired term was of considerable value to them, and that they have sustained loss and damage by the aforesaid termination thereof, which the said West Jersey Railroad Company,
127 party of the second part to said agreement, are liable to pay; and the said the West Jersey Railroad Company, on the other hand, claiming that the said George, Alfred and Nathaniel failed to keep and surrender said leased premises in proper condition and repair, and are liable, therefore, to the said West Jersey Railroad Company;

And that whereas neither of the said parties to said agreement admit such or any other liability to the other, but are yet willing and have agreed to submit to arbitration, as thereinafter stated, all matters in difference between them arising out of or in any wise resulting from

the covenants and provisions contained in the aforesaid agreements demising the said railroad and other premises, and the said termination of the term thereof, and said subsequent assignment, to the said the West Jersey Railroad Company:

It was agreed, and the said parties did thereby agree each with the other to submit, and thereby did submit, all the aforesaid matters in difference between them that had arisen, or that could in any wise arise or result from the covenant or provisions contained in the aforesaid agreement demising said railroad and other premises to the award and final determination of Henry F. Kenney and Matthew Baird, of the city of Philadelphia, and State of Pennsylvania, arbitrators by them agreed upon and chosen; and did further covenant and agree that the said arbitrators, having taken upon themselves the burden of said submission, should have full power and authority to ascertain and determine upon all the said matters in difference, and all damages, if any, that either party should pay to the other for or on account of the said matters in difference; and the said parties to said agreement did thereby further covenant and agree, each with the other, to stand to, abide by, pay and perform the award of said arbitrators in the premises, so that the same be made in writing, signed by them and ready for delivery to the parties on or before the first day of July next after the date of the said agreement.

And the said parties to said agreement did thereby further covenant and agree, each with the other, that if the said arbitrators should be unable to agree upon an award, then they, the said arbitrators, may themselves select some third person as umpire, who, as third arbitrator, shall join them in the submission aforesaid, and that the said three arbitrators, or any two of them, should have full power and authority to ascertain and determine upon all the said matters in difference, and all damages, if any, either party should pay to the other, for or on account of the said matters in difference, and that their award, or the award of any two of them in the premises aforesaid, made in writing and signed by them, or any two of them, and ready for delivery as aforesaid, on or before the said first day of July then next ensuing, should be binding and conclusive on the said parties to said agreement, and the said parties did thereby also covenant and agree, each with the other, to stand to, abide by, pay and perform the same.

And whereas the said Henry F. Kenney and Matthew Baird, having been first duly sworn faithfully and fairly to hear and examine the matters in difference between the said parties, and make a just and true award, according to the best of their skill and understanding, and having taken upon themselves the burden of said submission, and examined the matters in difference between the said parties, and being unable to agree upon an award, they, the said Henry F. Kenney and Matthew Baird, arbitrators as aforesaid, did, on the sixteenth day of June, eighteen hundred and sixty-nine, select, nominate and appoint Rufus A. Wilder, of Cresonna, county of Schuylkill, State of Pennsylvania, as umpire or third arbitrator, to act with them in the submission aforesaid, and the said Rufus A. Wilder, having been first duly
128 sworn, faithfully and fairly to hear and examine the matters in difference between the said parties, and make a just and true award, according to the best of his skill and understanding, did, as umpire or third arbitrator, join with the said Henry F. Kenney and Matthew Baird, arbitrators as aforesaid, and proceed to ascertain and determine upon all the said matters in difference, and all the dam-

ages, if any, that either party should pay to the other for or on account of the said matters in difference, submitted as aforesaid, and having heard and examined the allegations and proofs of the parties, and considered the same, we the subscribers, arbitrators appointed as aforesaid, do hereby make and publish our award in writing, of and concerning the matters in the said submission contained, and to us, the said arbitrators, submitted as aforesaid, as follows:

We do determine and award that the value of the said unexpired term, and the loss and damages sustained by reason of the termination thereof, to and by the said George W. Thomas, Alfred S. Porter and Nathaniel F. Chew, over and above all the claims made by the said the West Jersey Railroad Company, for not keeping the said railroad in proper condition and repair, and for all other claims made and insisted upon by the said the West Jersey Railroad Company before us, was and is the sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents.

And we do determine and award that the said The West Jersey Railroad Company pay to the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew the aforesaid sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents, on or before the twenty-ninth (29th) day of July next ensuing.

And we do determine and award that the said sum is in full satisfaction of all demands and controversies by and between the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, and the said The West Jersey Railroad Company, and that all controversies and demands whatsoever between the said parties respectively, to the day of the date of the aforesaid submission, cease and be determined.

And we do determine and award that the moneys paid by the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew to Richard D. Wood, under the provisions of the aforesaid lease or agreement and known and designated as the renewal fund, and claimed by the West Jersey Railroad Company, be paid to the said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, and that the West Jersey Railroad Company release to them all claim for the same.

And we do determine and award that the said West Jersey Railroad Company pay the sum of seventy-five dollars on demand, being the one-half fees and expenses of Rufus A. Wilder, the arbitrator chosen as aforesaid, and that all other the costs and charges of either party be borne and paid by the party incurring the same.

In witness whereof, we have hereunto set our hands this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

(Signed) M. BAIRD. [L. S.]
R. A. WILDER. [L. S.]

129 *Order for injunction.—Filed July 29, 1869.*

Upon reading the bill of complaint in this cause and the affidavits thereunto annexed, and on motion of Abraham Browning, of counsel with the complainants, it is on this twenty-ninth day of July, A. D. eighteen hundred and sixty-nine, ordered that upon filing the said bill and affadavits an injunction do issue according to the prayer thereof.

A. O. ZABRISKIE, *C.*

Answer.—Filed November 20, 1869.

The joint and several answer of George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, the defendants to the bill of complaint of the West Jersey Railroad Company, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves, and to each of them, all benefit and advantage of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them, or any of them, to make answer unto, they, these
130 defendants, severally answering, say that they admit that under and by virtue of the act of the legislature of the State of New Jersey, mentioned and set forth in the said bill of complaint and the several supplements thereto also set forth in said bill of complaint, the West Jersey Railroad Company was created and became a corporation and body politic as is set forth in said bill of complaint, and that under and by virtue of the powers and privileges and powers granted by said act of incorporation, the said complainant surveyed, laid out, constructed, equipped, and put in operation a railroad from the city of Camden, through the town of Glassboro, to the city of Bridgeton, in the county of Cumberland, a distance of near forty miles, long prior to the eighteenth day of March, eighteen hundred and sixty-eight, as set forth in said bill of complaint.

And these defendants further severally admit that by virtue of a certain other act of the legislature of the State of New Jersey, entitled "An act to incorporate the Millville and Glassboro Railroad Company," approved March ninth, eighteen hundred and fifty-nine, mentioned in said bill of complaint; and to which act, when produced, these defendants, for greater certainty, pray leave to refer, the said The Millville and Glassboro Railroad Company, was created a corporation and body politic, with power to lay out, construct, and put in operation a railroad from the town of Glassboro to the town of Millville, in the county of Cumberland, and that under and by virtue of the powers granted by said act of incorporation, the said The Millville and Glassboro Railroad Company laid out, constructed, equipped, and put in operation a railroad from Glassboro to said town of Millville, and that by virtue of certain agreements between the said The West Jersey Railroad Company and the Millville and Glassboro Railroad Company, the said two railroads formed a junction at or near said town of Glassboro, and said two railroads formed a continuous line of railway from Camden to Millville, and that said railroad was laid out, constructed, and equipped and put into operation by the said The Millville and Glassboro Railroad Company long prior to the eighteenth day of March, eighteen hundred and sixty-eight.

And these defendants, further answering, severally admit that prior to the said eighteenth day of March, eighteen hundred and sixty-eight, the said The Millville and Glassboro Railroad Company, by a certain lease or agreement, in writing, bearing date on the eighth day of October, eighteen hundred and sixty-three, made by the said company as party of the first part, these defendants, as party of the second part, and one Richard D. Wood, as party of the third part, had leased their said railroad and the rolling stock and equipments thereon and appertaining thereto unto these defendants for the term of twenty years from the first day of August, eighteen hundred and sixty-three, subject to

certain covenants in the said lease or agreement contained, that in and by the seventeenth clause of said lease or agreement, it was, among other things, covenanted and agreed, "that the said party of the first part should, at any time, have the right to put an end to the contract, and to all the right thereby given, retake possession of the said railroad, rolling stock, and buildings belonging or appertaining thereto, upon three months' notice to that effect given to the party of the second part, or to either of the persons thereof; but upon the termination of this contract, according to the notice thus provided, that if the party of the second part shall so desire, then the party of the first part shall and will appoint a competent and disinterested person, who, together with another disinterested and competent person appointed by the
131 party of the second part, shall consider and decide upon the value of this contract to the party of the second part, and the loss and damage incurred by and justly and equitably due to them by reason of such termination thereof; and in the event of any difference between the persons so appointed as aforesaid, as to the amount of damage justly and equitably due to the party of the second part, as aforesaid, then and in such case, the said two persons shall be at liberty to choose a third competent and disinterested person, and the decision of said two persons, or of a majority of said three persons, if a third be chosen, shall be final, conclusive, and binding upon the parties hereto," as by reference to the said lease or agreement, a copy whereof is in the hands of these defendants and ready to be produced and proven, and a copy whereof is annexed to the said bill of complaint, reference being thereto had will more fully and at large appear.

That these defendants, under and by virtue of said lease or agreement, had operated the said railroad, and had possession of the said railroad, rolling-stock, and equipments thereto belonging, from the time of the commencement of the said term in the said lease or agreement specified; and that during the continuance of the said lease, and whilst these defendants had possession of and were operating said railroad, to wit, on or about the twelfth day of October, eighteen hundred and sixty-seven, the said The Millville and Glassboro Railroad Company and the West Jersey Railroad Company entered into an agreement providing, among other things, for the consolidation of the two companies, so that all their corporate powers and franchises should be merged into, and all their corporate property should be owned by the West Jersey Railroad Company; that subsequent to said agreement, and in the early part of the month of November, in the year eighteen hundred and sixty-seven, the said The Millville and Glassboro Railroad Company gave notice to these defendants of their desire to put an end to and terminate the said lease or agreement, in accordance with the provisions thereof above set forth, on the first day of April, eighteen hundred and sixty-eight, then next ensuing; and that these defendants admit that prior to and on the eighteenth day of March, eighteen hundred and sixty eight, these defendants had possession of the said railroad, and of the equipments on and appertaining thereto under said lease or agreement, and claimed to have certain estates, rights, and interests of and in the same under said lease or agreement.

And these defendants, further answering, severally admit that by a certain other act of the legislature of the State of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," approved March eighteenth, eighteen hundred and sixty-eight, the contract or agreement made by and between the said The Millville and Glassboro Railroad Company and the West Jersey Railroad Company and above

mentioned was validated and confirmed, and the said companies were authorized to make said consolidation in accordance with the provisions of said agreement, and that when such assignment and transfer of the corporate powers, franchises, and property of the Millville and Glassboro Railroad Company, as is provided for in said agreement, should be made, the same shall be valid and effectual to convey and transfer the said powers, franchises, and property to and vest them in the West Jersey Railroad Company, subject however, to all the debts, liabilities, and obligations of both said companies, as by reference to the said act will more fully appear; and that in accordance with said agree-
132 ment, and under the authority of the said act of the legislature the said The Millville and Glassboro Railroad Company by a certain deed or indenture, bearing date and executed as in said bill mentioned, assigned and conveyed their said railroad and its appurtenances to the said complainants as in said bill mentioned, by virtue of which said deed or indenture the said complainants became and were seized and possessed of said corporate powers, franchises, and property, subject to all the debts, liabilities, and obligations of the said The Millville and Glassboro Railroad Company.

And these defendants, further answering, severally say, charge, and admit that after the said conveyance and assignment made by the said The Millville and Glassboro Railroad Company to The West Jersey Railroad Company, as aforesaid, and after the termination of the said term or lease of these defendants as aforesaid, these defendants, on or about the thirteenth day of April, eighteen hundred and sixty-eight, gave notice to the said The Millville and Glassboro Railroad Company, by serving said notice on the president of said company, desiring and requesting them to appoint an arbitrator to consider and decide upon the value of the lease or agreement made between the said company of the first part, these defendants of the second part, and Richard D. Wood, of the third part, dated the eighth day of October, eighteen hundred and sixty-three; and the loss and damage incurred by and due to these defendants by reason of the termination thereof, according to the provisions of the said lease or agreement above set forth, but that the said company neglected or refused to appoint an arbitrator in pursuance of said notice; that afterwards, and on or about the twenty-sixth day of May, eighteen hundred and sixty-eight, these defendants gave another notice to the said The Millville and Glassboro Railroad Company, by serving the same upon their president, and also by serving a copy of said notice upon the president of the West Jersey Railroad Company, desiring and requesting them to appoint a competent and disinterested person, who, together with Matthew Baird, a competent and disinterested person appointed by these defendants, should consider and decide upon the value of the said lease or agreement made by and between the said The Millville and Glassboro Railroad Company and these defendants, bearing date the eighth day of October, eighteen hundred and sixty-three, and above mentioned and in part set forth, to these defendants, and the loss and damage incurred by, and justly and equitably due to these defendants by reason of such termination thereof, and that on or about the twenty-eighth day of May, eighteen hundred and sixty eight, the West Jersey Railroad Company did appoint Henry F. Kenney as arbitrator on their behalf, in accordance with the provisions of the said lease or agreement as above set forth, and that afterwards, on or about the twenty-first day of December, eighteen hundred and sixty-eight, articles of submission of the said matters in difference to the award and determination of the said arbitrators named as aforesaid, and to such

umpire or third arbitrator as they should appoint, in case of their being unable to agree, of the general purport and effect set forth in said bill of complaint, were agreed upon and executed by these defendants and the said The West Jersey Railroad Company, as in said bill of complaint set forth, as by the said articles of submission or a counterpart thereof in the hands of these defendants and ready to be produced may more fully appear, a true copy of which said articles of submission, as these defendants believe, is annexed to said bill of complaint, and that the said Matthew Baird and Henry F. Kenney, arbitrators, chosen as aforesaid, accepted the trust conferred upon and reposed in them by said
133 articles of submission, and were duly sworn to faithfully and fairly hear and examine the said matters in difference, and make a just and true award, according to the best of their skill and understanding, at the time and in the manner stated in said bill of complaint.

And these defendants, further answering, severally say, charge, and admit, that after the said two arbitrators had taken upon themselves the burden of said submission, they met by adjournment in the city of Camden, on eleven or twelve different days, between that day and the twenty-first day of May, eighteen hundred and sixty nine, on which day they held their last meeting for taking testimony, and that all the said meetings were attended by the parties or their counsel, in whose presence all the testimony was taken, and that at the close of the said testimony it was agreed by the said parties and their counsel, in the presence of the said arbitrators, as hereinafter more fully stated, that the said counsel instead of proceeding with oral arguments should make written arguments, and deliver them to the said arbitrators on or before the thirty-first day of May last past, but these defendants severally deny that the said two arbitrators held any meeting at which the parties attended, or at which testimony was taken, on the twenty-fourth day of May last, as charged in said bill of complaint, or that any agreement whatever was made by and between the said parties or their counsel, on said twenty-fourth day of May last, in regard to said arbitration, or any matters connected therewith.

And these defendants, further answering, severally admit and state and charge that after the first meeting of said arbitrators, on the twenty-first day of January last, they adjourned to the ninth day of February last, at which meeting the several printed and written exhibits mentioned in said bill of complaint were offered in evidence as exhibits before said arbitrators, except that the counterpart of said articles of submission, held by these defendants, was not offered in evidence, and that all of said papers so offered in evidence were offered on the part of the said complainant, and that no verbal testimony was offered in evidence on that day, and that after the said papers were offered in evidence it was agreed that the parties to said submission should, at the next meeting, submit to the said arbitrators written statements of their respective claims against the other, and it was then further agreed by the respective parties and their counsel in the presence of said arbitrators that a phonographer should be employed by the said parties, who, under an oath of accuracy, should take down the testimony, and should furnish copies of said testimony to the counsel of the respective parties, and that such testimony, thus taken down and written out by said phonographer, should be used by said arbitrators and any umpire or third arbitrator that might be appointed by them, in making up their award without a re-examination of said witnesses, in the event of an umpire or third arbitrator being appointed, and these defendants severally deny that any other or different agreement was made in reference

to the taking down, writing out, or using of said testimony by said arbitrators, or that the agreement mentioned in the said bill of complaint was made or entered into by said parties, or that it was merely agreed to employ a phonographer to take down and write out the testimony, and that in case the two arbitrators could not agree, the notes of the phonographer could be used before the said three arbitrators; and these defendants severally charge and state that it was then and there expressly agreed that the testimony written down and copies thereof furnished by said phonographer, should be used by said arbitrators, and any umpire they should appoint in making up their
134 award, and these defendants severally admit that a phonographer was employed, and attended and took down and wrote out copies of the evidence taken at all the subsequent meetings of said arbitrators for hearing evidence, except the sixth meeting, when, by agreement of the parties, said phonographer being absent, the evidence was taken down by one of the counsel of these defendants, and a copy afterwards written out and furnished to the counsel of the complainant by said phonographer, and the eleventh meeting when but one witness was examined, and the evidence was taken down by agreement of the parties and their counsel by one of the counsel of the respective parties, and that the said phonographer furnished to the counsel of each party a copy of the evidence taken down by him. And these defendants further answering, severally admit that at the meeting of the said arbitrators on the sixteenth day of February, in accordance with the agreement above set forth, each of said parties submitted written statements of their demand on the other, and that the demand of the complainant was special and in items, and that the demand of these defendants was general.

And these defendants further answering, severally admit, show, and charge, that at the meeting of said arbitrators to hear testimony, eleven witnesses were examined in behalf of these defendants on the sixteenth and nineteenth days of February and the tenth day of May; and that twenty-nine witnesses were examined on behalf of the complainant on the first, eighth, and twenty-third days of March, the twenty-sixth day of April, and the third and twenty-first days of May; and that the testimony of all the witnesses, except a few examined at the sixth hearing, on the twenty-sixth day of April, and one examined on the eleventh hearing, on the twenty-first day of May, was taken down and copied by said phonographer, in accordance with said agreement, and that the copies of said testimony, as written out by said phonographer in questions and answers, covers between four and five hundred pages; and that the said complainant also produced before said arbitrators, and had marked as exhibits (but did not read) a number of pamphlets of the reports of railroads and canals made to the legislature of the State of New Jersey, three volumes of the reports of railroad officers to the legislature of the State of New York, two volumes of the reports of railroad officers to the legislature of the State of Pennsylvania, one volume of reports of railroad officers to the legislature of the State of Massachusetts, one volume of railroad statistics, published by H. Poor, and a number of reports of railroad directors to their stockholders, most of which were contained in the volumes of reports above referred to; and that the said complainants made statements upon single sheets of paper of the result of the operation of roads most favoring their views, contained in the above volumes of reports, and offered them in evidence as exhibits before said arbitrators; and these defendants severally deny that the said pamphlets and volumes of reports were read in evidence before the

said arbitrators, although marked as exhibits, or that a fair reading and study of all the printed matter offered in evidence before said arbitrators was essential or necessary to an intelligent or proper comprehension of the merits of the matters in difference, submitted to said arbitrators as aforesaid.

And these defendants further answering, severally admit, charge, and show that the counsel for the said complainant before the said arbitrators were Abraham Browning and John T. Nixon, esquires, and the counsel for these defendants were Attorney-General Robeson and Peter
135 L. Voorhees; that the rebutting testimony offered by these defendants was closed at the eighth meeting of said arbitrators, held on the tenth day of May last, and that on that day the said arbitrators adjourned to meet on the fourteenth day of May last; that at the meeting of said arbitrators held on the fourteenth day of May last, the said complainant failed to produce any witnesses before said arbitrators to be examined, and the counsel of said complainant stated that they would have but one or two witnesses to examine, and requested said arbitrators to adjourn the hearing to a further day.

That said arbitrators then adjourned to meet on the twenty-first day of May last, and ordered and directed that after the examination of the witnesses then produced by the said complainant, the counsel of the respective parties should proceed with the arguments before said arbitrators, and that the same should be closed and the cause submitted to them, the said arbitrators, on the twenty-fourth day of May last.

That the said arbitrators met on the said twenty-first day of May last, when the said complainant produced one witness, who was examined and whose testimony was written down as aforesaid, and that the counsel of these defendants were then prepared and ready to proceed with the argument of said cause, before the said arbitrators, but that the counsel of the said complainant were not ready and were unwilling to proceed with the argument of said cause, in accordance with the direction of said arbitrators, and that on that day, the said twenty-first day of May, it was then and there expressly agreed by the parties and their counsel, in the presence of the said arbitrators, that no oral arguments should be made in the said cause, but that the counsel of the respective parties should prepare written arguments to be submitted to the said arbitrators, and that the arguments prepared by the counsel of these defendants, and the copy of the testimony furnished them as aforesaid, together with all the exhibits and papers aforesaid in evidence and used in the hearing of said cause, should be delivered by these defendants, or their counsel, to the said Matthew Baird, at his office in the city of Philadelphia, on or before the thirty-first day of May last, and that the arguments prepared by the counsel of the complainants, and the copy of the testimony furnished them as aforesaid, together with the exhibits and papers offered in evidence and used in the hearing of said cause, should be delivered by the said complainants, or their counsel, to the said Henry F. Kenney, at his office in the city of Philadelphia, on or before the thirty-first day or May last, and that the said arguments, testimony and papers delivered to the said Baird and Kenney, arbitrators as aforesaid, should be used by them and such umpire, or third arbitrator as they should appoint in making up their award, and that no other or further communication on the subject matters in dispute, under said submission, should be received by the said arbitrators or any umpire or third arbitrator they should appoint, until an award had been made in accordance with the provisions of the said submission, and it was then and there expressly agreed by and between said parties

and their counsel, in the presence of the said arbitrators, that the said arbitrators should hold all their subsequent meetings in the city of Philadelphia, or at such other place as they, the said arbitrators, should appoint and agree upon, and should be most for their convenience; that in accordance with the aforesaid agreements the counsel of these defendants prepared a written argument in said cause, and these defendants, or some of them, and their counsel, or one of them, delivered the said argument, copy of the testimony, exhibits and papers to the
136 said Matthew Baird, at his office in the city of Philadelphia, on the said thirty-first day of May last, and that on the same day the said complainant or their counsel, as these defendants have been informed and believe, delivered the arguments of their counsel, copy of the testimony, exhibits and papers to the said Henry F. Kenney, at his office in the city of Philadelphia.

That afterwards, as these defendants have been informed and believe, the said Matthew Baird and Henry F. Kenney, in accordance with the aforesaid agreement of the said parties and their counsel, held divers meetings in the city of Philadelphia, and being unable to agree upon an award, the said Baird and Kenney, in accordance with the provisions of the aforesaid lease or agreement, and of the said submission and of the agreement of the said parties, did select, and by a writing drawn by said Henry F. Kenney and signed by said Kenney and Baird on the sixteenth day of June last, did appoint one Rufus A. Wilder, a person entirely unknown to these defendants, or any of them, as umpire or third arbitrator, to join them in the said arbitration, as by reference to the said appointment now in the possession of these defendants will more fully appear; that the said Rufus A. Wilder was afterwards duly sworn on the twenty-fourth day of June last before James B. Dayton, esquire, one of the masters in chancery of this State, at his office in the city of Camden, in accordance with the laws of the State of New Jersey, to faithfully hear and examine the matters in difference and make a just and true award to the best of his skill and understanding, as by reference to the said oath in possession of these defendants, and ready to be produced, will more fully appear; that in accordance with the aforesaid agreement of the said parties and their counsel in the presence of the said arbitrators, the said Rufus A. Wilder, Henry F. Kenney, and Matthew Baird repeatedly met together as arbitrators in the city of Philadelphia, and that they met as arbitrators in said cause on the twenty-ninth day of June last at the office of said Matthew Baird in the city of Philadelphia, and that at the said meeting of the said Kenney, Baird, and Wilder, arbitrators as aforesaid, the said Matthew Baird and Rufus A. Wilder did agree upon and make the award, a copy of which is annexed to the complainant's said bill of complaint; that the said award thus agreed upon was sketched and reduced to writing by the said Rufus A. Wilder, and was given by the said arbitrators to a clerk of the said Matthew Baird to be copied in duplicate before signing by the said arbitrators; that after the said award had been made and agreed upon by the said Baird and Wilder as aforesaid, and while the same was being copied as aforesaid, the said Henry F. Kenney said he was unable and unwilling to agree to or sign the said award, and then and there withdrew from the meeting of the said arbitrators, and refused to sign said award or to act further with them in the premises; that before said award had been fully copied in duplicate as aforesaid, or signed by the said Matthew Baird and Rufus A. Wilder, and shortly after the said Henry F. Kenney had refused to agree to and sign the said award, and to further act with the said arbitrators, and had withdrawn

from the meeting of the said arbitrators, a writ of injunction issue dont of the supreme court of the State of Pennsylvania at the suit of the said complainant, was served upon the said Matthew Baird and Rufus A. Wilder at the office of the said Matthew Baird on the said twenty-ninth day of June last past, as will be hereinafter more fully stated, restraining them from further proceeding as arbitrators in said cause, and from making, signing, or delivering any award, or paper pur-
137 porting to be an award, in the premises; that after the service of the said injunction upon the said Matthew Baird and Rufus A. Wilder as aforesaid, and after the said award made by them as aforesaid had been copied in duplicate as aforesaid, the said Matthew Baird and Rufus A. Wilder, under the advice of counsel, that the signing of the said award so agreed upon and made by them as aforesaid would not be a breach of the said injunction served upon them as aforesaid, signed the said award so made by them in writing at a meeting held by them on the thirtieth day of June last, and held the same ready for delivery to the parties on the said thirtieth day of June, in accordance with the terms of the said submission, and that on the said thirtieth day of June the said Matthew Baird and Rufus A. Wilder joined in a letter to these defendants and said complainant, notifying them that they had agreed upon an award, in which the other arbitrator did not agree and declined to unite, and that they had the same ready for delivery to the parties, in accordance with the terms of the said submission, and delivered the same to their counsel, to be forwarded to these defendants and said complainant respectively; that afterwards the said letter directed to these defendants was delivered by said counsel to these defendants, on the fifth day of July last, and the letter directed to the said complainant was, as these defendants are informed and believe, sent by said counsel to said complainant by mail, and was received by them on about the third day of July last.

And these defendants, further answering, severally admit that in the agreement to submit the said cause to said arbitrators upon written briefs, nothing was said about counsel of either party having their arguments printed, and that the counsel of these defendants joined in one argument, and had the same printed, and that the counsel of these defendants delivered two copies of said printed argument to said Matthew Baird, one for his own use, and one for the use of said Henry F. Kenney, and that, as these defendants have been informed and believe, Abraham Browning, esquire, one of the counsel of the said complainant, had his argument printed for general distribution, but these defendants are not informed, save by said complainant's said bill, whether the argument of Mr. Nixon, the other counsel of said complainant, was printed, and can form no belief concerning the same; but these defendants deny that the fair meaning and intent of the said agreement to submit said cause was that the arguments should be submitted in manuscript, or that the counsel of these defendants had their arguments secretly printed, or that they delivered the said Matthew Baird several copies of said argument for the use of himself and for distribution to his co-arbitrators and others, or that they delivered him any copies of said argument, except two copies as aforesaid, or that the said argument of Mr. Nixon was never seen or read except by said arbitrator Kenney, and these defendants state and charge that they have been informed, and believe such information to be true, that the said argument of Mr. Nixon was seen and read and considered by the other arbitrators before the making up and signing by them of their said award as aforesaid.

And these defendants, further answering, severally admit, state, and

show that it may be true, as stated in said bill of complaint, that after the said arguments had been delivered to the said two arbitrators, as aforesaid, the said complainants had no communication or inter-
138 course with said two arbitrators; and that the said complainant was not notified or advised of the inability of said two arbitrators to agree upon an award, but these defendants are either strangers to such matters, and cannot form any belief concerning the same; and it may be true, for anything these defendants know to the contrary, that the counsel of the said complainant advised the said complainant as in said bill of complaint is stated, but these defendants are utter strangers to such matters, and cannot form any belief concerning the same; but these defendants charge and state that if said advice was given, it was contrary to the agreement made by the said parties and their counsel, and above set forth, that the said arbitrators should proceed with said arbitration without any further communication from the said parties, or either of them; and that the said arbitrators did not give any notice or advice to these defendants, or any of them, of their inability to agree upon any award, or of their appointing a third arbitrator, except as hereinafter more particularly stated; nor had these defendants, or any of them, any communication with said arbitrators, except as hereinafter stated.

And these defendants, further answering, severally admit, state and show that it may be true, for anything these defendants know to the contrary, that no notice was given by said arbitrators to the said complainant, or their counsel, of their inability to agree, or of their selection of a third arbitrator, or of any meeting by them alone, or in connection with a third arbitrator; and that all proceedings of said arbitrators, after closing said testimony, were secret and without notice to the said complainant, or to these defendants, or any of them, and that said proceedings were conducted in the city of Philadelphia, in accordance with the agreement above set forth between the said parties and their counsel, for said arbitrators to proceed in said matters without further communication from said parties or their counsel, and in the city of Philadelphia, or such other place as should be most suitable for their convenience.

And this defendant, Alfred S. Porter, further severally answering, states and shows, and these defendants, George W. Thomas and Nathaniel F. Chew, believe it to be true, that on or about the eighteenth day of June last past he casually met the said Matthew Baird, in the city of Philadelphia, and asked him if said arbitrators had yet agreed upon an award, when said Baird informed this defendant that the said arbitrators had not been able to agree upon an award, and had selected a third arbitrator to join with them in making said award, and that said Henry F. Kenney was to inform said complainant and their counsel thereof; that this defendant, on that day, or the day following, met the said George W. Thomas, one of these defendants, and told him what he had been informed by said Baird, and advised him to see their counsel in the matter, which this defendant believes he afterwards did.

And this defendant, George W. Thomas, further severally answering, states and shows, and these defendants, Alfred S. Porter and Nathaniel F. Chew, believe it to be true, that after he had been informed by said Porter that said arbitrators had failed to agree, and had appointed a third arbitrator, he went to the office of Peter L. Voorhees, (in the city of Camden,) one of their counsel in said matter, and informed him what had been told him by said Alfred S. Porter about the appointment of a third arbitrator, but that this defendant did not then know the name

of said third arbitrator, or where he lived; that said counsel advised this defendant, that if such an appointment had been made, it
139 was important that it should be done in writing, and in a proper manner, and that he, the said counsel, would prepare a proper form for the appointment of said arbitrator; that while said counsel was making a draft of said appointment, Attorney-General Robeson, the other counsel of these defendants, came into the office of the said Peter L. Voorhees, and was informed as to the manner and form of said appointment; that after the said appointment had been drawn by said Voorhees, he suggested that he would submit the same to Abraham Browning, esquire, counsel of the complainant, for his approval; that the said Voorhees left his office with the draft of said appointment and shortly afterwards returned, stating that he had seen the said counsel of the said complainant, and that he declined and refused to join with him in settling the form of said appointment, or have anything whatever to do with the same; that afterwards the said counsel of these defendants endorsed upon a counter part of the said submission, which was in the hands of said counsel, (the same never having been delivered to said arbitrators, but a copy thereof,) a form of the appointment of said third arbitrator, leaving blanks for the name and place of residence of said third arbitrator, and also a form of the oath of said third arbitrator, leaving blanks for his name, &c., and that this defendant took the said counterpart of said submission, with said form of appointment, and oath of said third arbitrator, written thereon, as aforesaid, and delivered the same at the office of the said Matthew Baird, in the city of Philadelphia.

And these defendants, further answering, severally deny that on the said twenty-fourth day of June last the counsel of these defendants informed the said counsel of the said complainant that he had learned that said two arbitrators could not agree, and requested him to join in framing the proper form of the appointment of a third arbitrator; and that, as these defendants are informed and believe, the said counsel of these defendants never applied to the said counsel of said complainant for that purpose except on one occasion, and that was on Monday, the twenty-first day of June last, as above stated, and not on the twenty-fourth day of June, as stated in said bill of complaint.

And these defendants, further answering, severally say, that it may be true, as stated in said bill of complaint, that on the said twenty-sixth day of June last the said complainant ascertained that said abritrators had selected a third arbitrator, named Wilder, and that it was agreed by said three arbitrators to have a meeting on the twenty-eighth day of June last, at the office of the said Henry F. Kenney, in the city of Philadelphia, and that it had been agreed by said arbitrators that the appointment of said Wilder, and the said meeting appointed for the twenty-eighth day of June last, and all subsequent ones, should be private, without notice to the parties, and without hearing or evidence except from the statements of said two arbitrators, and examinations of the oral testimony, reduced to writing by the said phonographer, and from said written and printed exhibits, but these defendants are strangers to such matters, and cannot form any belief concerning the same, but these defendants state and show that, as they have been informed and believe, when the said Wilder was appointed as such third arbitrator, on the sixteenth day of June last, it was expressly agreed by and between the said Baird and Kenney that said Kenney should inform said complainant of said appointment of said third arbitrator, and said Baird should inform these defendants of such appoint-

ment; and that these defendants have been informed and believe
140 that said three arbitrators did meet on said twenty-eighth day of June last, at the office of said Kenney, and these defendants state and charge that said meeting was held without any notice to these defendants or their counsel, or any of them, and that it had been agreed by said arbitrators that the appointment of said Wilder and the meetings of said arbitrators should be private, and without notice to the parties, and without hearing or evidence, except from the statements of said two arbitrators and examinations of the oral testimony written by said phonographer, and from said written and printed exhibits, as stated in said bill of complaint, the same was in accordance with the agreement made by and between the said counsel and the said parties in the presence of said arbitrators, that after the delivery of the written arguments to said arbitrators as aforesaid no further communication should be made to said arbitrators until an award should be made and signed as above set forth.

And these defendants, further answering, severally say, that it may be true as stated in said bill of complaint, that on the twenty-eighth day of June last, the said complainant learned that said arbitrators had a meeting at the office of said Henry F. Kenney, and had adjourned to hold another meeting at the office of said Matthew Baird, but these defendants are utter strangers to such matters and cannot form any belief concerning the same; but these defendants say that they have been informed and believe said arbitrators had a meeting on the twenty-eighth day of June last, at the office of Henry F. Kenney, and on that day adjourned to have another meeting at the office of Matthew Baird, on the twenty-ninth day of June last past, and that both of said meetings were without any notice of them being given to these defendants, or their counsel, or any of them.

And these defendants, further answering, severally admit, charge, and show that, as they have been informed and believe, the said three arbitrators met on the twenty-ninth day of June last, at the office of said Matthew Baird, without giving notice of said meeting to said complainant, and without any notice of said meeting being given to these defendants, or their counsel, or any of them, and that while the said arbitrators were in session, the said complainant caused to be served on said arbitrators a protest, of such general or similar purport as set forth in said bill of complaint, and that the said complainant, or their counsel, exhibited in the supreme court of Pennsylvania a bill of complaint against arbitrators, and these defendants praying for an injunction to the purport and effect set forth in said bill, and that the said injunction was issued and served upon the said arbitrators at or about the time and in the manner mentioned in said bill of complaint.

And these defendants further answering severally say, state, and charge that as these defendants have been informed and believe, that before and at the time of the service of the said protest by the said complainant, or the service of the said writ of injunction, the said arbitrators or two of them, at the meeting of and in the presence of all three of the said arbitrators, had agreed upon and made an award in said cause, which said award had been sketched and reduced to writing, and at the time of the said service of the said injunction was being copied in duplicate for the purpose of being signed by said arbitrators; that as these defendants have been informed and believe, on the morning of the said twenty-ninth day of June last, the said Matthew Baird, one of the said arbitrators, sent a communication to Peter L. Voorhees, one of the counsel of these defendants, requesting him to meet said

141 Baird at his office in the city of Philadelphia, at two o'clock in the afternoon of said day, and that in accordance with said request, said counsel went to the office of said Baird at about twenty minutes past two o'clock of said day, and found all three of said arbitrators there in session; that upon said counsel having his name announced he was shown into a room where said three arbitrators were in session, when said Matthew Baird stated to said counsel, in the presence and hearing of the said other two arbitrators, that they, the said arbitrators, had agreed upon an award, and had sent for said counsel to copy the same in proper form, in duplicate, ready for signing by said arbitrators; that the said counsel refused to copy or write out said award, stating to said arbitrators that his doing so might raise some presumption against the bona fides of said award.

That afterwards the said arbitrators, or some of them, employed one of the clerks of said Matthew Baird to copy the said award in duplicate, ready for the signatures of the said arbitrators; that while the said award was being copied as aforesaid, and before the said injunction was served upon the said arbitrators, the said Henry F. Kenney, one of the said arbitrators, refused to agree to or sign the said award agreed to and made by the other two arbitrators, and refused further to act in the premises as arbitrator, and withdrew from and left the meeting of the said arbitrators, and while the said two arbitrators were still in session, and waiting for the said award to be copied in duplicate, and before the said award was signed by said two arbitrators, the said writ of injunction was served upon them; that after the said award had been copied in duplicate, and after the service of the said writ of injunction, the said two arbitrators adjourned for the purpose of consulting counsel in the premises; that the said two arbitrators, after consulting their counsel, met again early in the morning of the thirtieth day of June last, and then and there, under the advice of counsel, signed the said award agreed upon and made by them on the said twenty-ninth day of June last, which the said Henry F. Kenney, the other arbitrator, refused to agree to or sign as aforesaid, and at the same time the said two arbitrators drew up (or caused to be drawn up) and signed notices to the said complainant and these defendants, dated the said thirtieth day of June last, that they had agreed upon an award and had the same ready in accordance with the terms of the submission, although said arbitrators were not required by the terms of the submission to give such notice or any notice; and these defendants further state and show that, as they have been informed and believe, when the said writ of injunction was served on said Baird and Wilder, two of said arbitrators, an award had been agreed to (and sketched or drawn) by said arbitrators, or two of them as aforesaid, and that said award had not been signed, and that there had not been any adjournment of said arbitrators to any other time or place to meet and confer together, and that the said award so agreed to and made by the said two arbitrators, and which the said Henry F. Kenney refused to agree to and sign, was not presented to him for his signature or otherwise; that the said three arbitrators, after the making of the said award and the refusal of the said Henry F. Kenney to agree to and sign the same, and to further act as arbitrator in said matter, were not together by appointment or otherwise after the service of the said writ of injunction.

And these defendants further answering, severally say that they are informed and believe, and from such information and belief deny that on the second day of July, after the time limited by said
142 article of submission for making an award, and while the said

injunction was in full force and undissolved, the said Mathew Baird and Rufus A. Wilder drew up, or procured to be drawn up, a paper purporting to be an award by them, as two of said arbitrators, of and concerning the matter in difference aforesaid, or that they on that day, or at any other time, drew up and signed any award other than the award made by them as aforesaid, on the said twenty-ninth day of June last, and signed by them on the said thirtieth day of June last, as aforesaid; and these defendants deny as aforesaid that the said award made by the said arbitrators was falsely and fraudulently dated on the twenty-ninth day of June, to make it appear to have been made by them on that day, and within the time limited by said articles of submission, or before the service of the said writ of injunction, or that the said arbitrators signed said award or any award on the second day of July last.

And these defendants deny and state as aforesaid that the said arbitrators by a letter, falsely and fraudulently dated on the thirtieth day of June last, notified the complainant that they had made an award and that it was ready for delivery to said parties, or that the said arbitrators signed any letter notifying said complainant of the making of the said award, other than the one signed by them, on the said thirtieth day of June last, as above set forth, which letters the said arbitrators delivered to their counsel to be sent to the said complainant, but at what time the said letter was mailed or received by the said complainant these defendants are not informed, except by the said bill of complaint, and cannot set forth any belief concerning the same.

And these defendants, further answering, severally state, show, and charge that, by the rules of practice of the supreme court of Pennsylvania, the argument of a rule to show cause why the said injunction should not be continued, came on to be heard on the third day of July last, at which time the argument of said rule by consent of the counsel of the complainant and of these defendants, and by order of said court was continued until the fifth day of July last; that on the said fifth day of July last, when the argument of said rule came on to be heard, the said complainant by their counsel moved the said court to issue writs of attachment against the said Matthew Baird and Rufus A. Wilder for contempt of said court, by signing said award after the service of said writ of injunction; that affidavits in support of and against said motion for said attachment for contempt were read before said court, and that after argument the said injunction was dissolved and said writ of attachment was refused by said court.

And these defendants, further answering, severally say that they have been informed and believe that after the said injunction had been dissolved as aforesaid, and on or about the seventh day of July last, the said Matthew Baird took the said award so made by him and the said Rufus A. Wilder, on the twenty-ninth day of June last, and signed by them as aforesaid, or a duplicate copy thereof, to the city of Camden, and there delivered it to a clerk of said Baird's, with directions for him to deliver the same the said complainant, and that the said clerk delivered the same on the said seventh day of July last to George J. Robbins, the secretary and treasurer of the said complainant, at their office in the city of Camden; and that the said award set forth and re-
143 cited in substance and effect the matters and things set forth in said bill of complaint; and that a copy of said award, as these defendants believe, is annexed to said bill of complaint, as will and may more fully appear by said award, or a duplicate copy thereof, signed by said arbitrators, and in the hands of these defendants, and ready to be

produced may more fully and at large appear, and which said award these defendants pray may be taken as part of this their answer.

And these defendants, further answering, severally say, state, and charge, that as they have been informed and believe the said Rufus A. Wilder was legally and properly appointed and selected as third arbitrator, by the said Matthew Baird and Henry F. Kenney, to join with them in the said submission, and that the said Wilder was selected and appointed by said arbitrators on the sixteenth day of June last, by writing as above stated, and these defendants deny that the said Wilder never was legally or properly appointed, or selected as a third arbitrator to join said Baird and Kenney in the said submission to them; and these defendants further state and show that, as these defendants have been informed and believe, the said Wilder was legally and properly sworn before James B. Dayton, esquire, one of the masters of this court, at his office in the city of Camden, on the twenty-fourth day of June last, as above stated, and these defendants deny that the said Wilder was not legally and properly sworn, or that the said Wilder was secretly or fraudulently sworn, or that he was sworn by any contrivance or procurement of these defendants, or any of them, or that the said Wilder was sworn with any notice to or knowledge of these defendants, or their counsel or any of them, and these defendants state and show that these defendants had not any knowledge or notice of the time when, the place where, or the officer before whom the said Wilder was sworn, until at or about the time when the said arbitrators made the award as aforesaid, and these defendants further state that they have been informed and believe that the said Wilder was appointed on the sixteenth day of June last, as above stated, and deny that the said Wilder was not appointed until the twenty-eighth day of June last, and after he had been sworn in; and these defendants further state that as they have been informed and believe that after the said Rufus A. Wilder had been selected and appointed by the said Matthew Baird and Henry F. Kenney as third arbitrator, to act with them under said submission, that the said Matthew Baird, by and with the consent of the said Henry F. Kenney, sent to the said Wilder, on or about the eighteenth day of June last, a copy of the oral evidence, written out by the said phonographer as aforesaid, and copies of the arguments of the counsel in the said cause, and copies of the written exhibits offered in evidence before said two arbitrators, by the said complainant as well as by these defendants, but not the copies of the reports of railroad officers (copies of which said reports the said Wilder had in his possession), and that as these defendants have been informed and believe, the said Wilder studied and read all of said evidence, arguments, and exhibits, and that the said Matthew Baird and Rufus A. Wilder never had any private meetings and consultations of and concerning the matters in difference referred to in said submission; and these defendants have been informed and believe, and from such information and belief deny that the said Baird and Wilder had any private or secret meetings, considerations, or consultations of the matters in difference of said submission, without the knowledge or
144 consent or contrary to the wishes of said Kenney, or that they had any consultations or considerations of the said matters in difference, mentioned in said submission, except in the presence of said Kenney, until after said award had been agreed upon as aforesaid, and these defendants deny as aforesaid that the said Baird only furnished to said Wilder a copy of the evidence taken by said phonographer, and such documentary evidence as was offered by these defendants, or that any ex parte statements of the said Matthew Baird, or his views and

opinions were ever urged on the consideration of said Wilder, or that the opinions of said Wilder, touching the said matters in difference, were made and formed without evidence or pretence of evidence, except a copy of said testimony and exhibits offered by these defendants, and without exhibits offered on the part of the said complainant.

And these defendants severally deny as aforesaid that at no time before or after the meeting of said three arbitrators on the twenty-eighth day of June last was any part of the written and documentary evidence before said Kenney and Baird submitted to, seen, read, or considered by the said Wilder; but these defendants charge that the written evidence and exhibits, or copies thereof, had been delivered to said Wilder with the consent of said Kenney, and had been seen, read, studied and considered by the said Wilder; and these defendants deny, as aforesaid, that the said Baird and Wilder refused to go with said Kenney into an actual and formal examination of the oral and documentary testimony offered before said arbitrators by said complainants; but these defendants state and charge that, as they have been informed and believe when the said three arbitrators met they went into and through an examination and discussion of all the said testimony, both oral and documentary, that had been offered by the said complainant or these defendants, and that, if all of said testimony was not formally read by said arbitrators at their said meeting, yet the same was discussed and referred to, and examined, whenever any difference arose between the recollection of said arbitrators as to the character or effect of said testimony, and these defendants deny, as aforesaid, that the said award made by the said Baird and Wilder, as aforesaid, was made without the knowledge of said Henry F. Kenney, or that the same was never considered by said Kenney, or that the said Kenney had no opportunity to consider or consult upon the said award; but these defendants state and show that, as they have been informed and believe, the said award was made and agreed to by said Baird and Wilder, in the presence of and with the full knowledge of said Kenney; that after said award had been agreed to, and made and sketched, and written out by said arbitrators, and was being copied in duplicate for signing by said arbitrators, said Kenney refused to agree to or sign said award, and withdrew from the meeting of said arbitrators, and refused to further act in said matter as above stated; and these defendants further deny, as aforesaid, that the said award was not made and ready for delivery to the parties to said submission until after the first day of July last, and these defendants severally state that, as they have been informed and believe,

145 that said award was made in writing and signed by said Baird and Wilder, two of said arbitrators, and ready for delivery on the thirtieth day of June last, as before stated, and that notice of the making of said award was written and signed by the said Baird and Wilder, and directed to be sent to said complainants on said thirtieth day of June last, as before stated.

And these defendants submit and state that by said article of submission the said arbitrators were only required to make an award in writing and have the same ready for delivery to the said parties on or before the first day of July last, and that if said arbitrators neglected to give notice of the making of said award to the said parties, or either of them, it could not in any way affect the said award made by them as aforesaid; and these defendants further state and show that on the fifth day of July last, and after the injunction obtained by said complainants in the supreme court of Pennsylvania had been dissolved as aforesaid,

the said Matthew Baird, at the request of these defendants and their counsel, or some of them, delivered the copy of said award in writing, signed by said Baird and Wilder, to these defendants, and the same was immediately brought by these defendants or their counsel into the State of New Jersey, and that afterwards, on the seventh day of July last, as these defendants have been informed and believe, the said Baird brought a copy of said award to the city of Camden, and by the hands of one of his clerks delivered the same to the secretary and treasurer of the said complainant at their office in the city of Camden; and these defendants severally deny that the proceedings of the said arbitrators, or any of them, were illegal, fraudulent, or void; and these defendants state and charge that the proceedings of the said arbitrators in the appointment of the said third arbitrator and in holding their meetings in the city of Philadelphia, and without notice to or knowledge of the said complainant, or these defendants, and to the exclusion of the said complainant, or of these defendants being heard before said three arbitrators in making their said award in the city of Philadelphia, was in accordance with and pursuant to the said agreement made by the said complainant and their counsel with these defendants and their counsel in the presence of the said arbitrators, when it was agreed that the said cause should be submitted to said arbitrators on written arguments, and that said arbitrators should proceed in said cause and make an award under said submission without any further communication from said parties, or their counsel, or either of them, as above set forth; and these defendants deny that the said award is fraudulent, illegal, or void, or contrary to the honest truth or justice of the case, or in disregard to the testimony submitted to the said arbitrators, or that the same ought to be set aside.

And these defendants, further answering, severally say that they have been informed and believe, and from such information and belief deny that all the evidence which had been submitted to the said arbitrators, Kenney and Baird, on the part of the said complainants, was in a box, closed up in the office of the said Kenney, at the time of the first meeting of the said three arbitrators, or that the said evidence had not been seen by or opportunity offered to said Wilder to inspect the same before said meeting, or that the said Baird and Wilder refused to look into, read, or examine the said evidence; and these defendants state and show that as these defendants have been informed and believe that the said Wilder was furnished by said Baird, by and with the consent of said Kenney, with a true copy of said evidence, taken and made by said phonographer,

146 and with true copies of the written exhibits offered in evidence by said complainant and by these defendants, on or about the eighteenth day of June last, and that said Wilder read, studied, examined, and considered all of said evidence, and that at the first meeting of the said three arbitrators the said Wilder and Baird went to the box held by the said Kenney containing the evidence or part of the evidence offered by the said complainant and examined the contents thereof to ascertain if there were any exhibits or evidence contained therein, copies of which had not been furnished them, or with which they were not familiar, and did examine and consider all evidence and exhibits, copies of which had not been furnished to them, and with which they were not familiar.

And these defendants deny as aforesaid that the said Wilder joined in said award without any legal, rational, or competent knowledge of a large and reliable portion of the evidence which had been submitted to said arbitrators, or that the same was not competent or legal evidence

to be considered by the said Wilder, or that the said evidence was examined by said Wilder without the consent of said complainant, or that the written argument of John T. Nixon, esquire, was not read or considered by said Wilder; and these defendants further state and charge that the said Rufus A. Wilder was appointed as said third arbitrator, and read and examined, and considered the said evidence and exhibits offered by the said complainant and these defendants before said arbitrators, and the arguments of counsel in said cause, and made and signed said award in accordance with the express agreement of said complainant and their counsel, made in the presence of said arbitrators, that the said arbitrators should proceed and appoint a third arbitrator, and proceed and use said evidence and arguments of counsel, and make their award in accordance with the said submission, without any further communication from the said parties or their counsel, as herein set forth.

And these defendants, further answering, severally admit that they or some of them, acting in behalf of all, called on the said Thomas Jones Yorke, on the said 29th day of July last, and demanded of him payment of the said sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents, which in and by the said award was to be paid to these defendants on that day, and that these defendants intend to proceed and collect the moneys due upon said award as these defendants submit they have a right to do, and that these defendants did, on the said twenty-ninth day of July last, commence an action for the recovery of the said money due on said award against the said complainant in the supreme court of the State of Pennsylvania, and that the said suit is now pending in said court, nothing having been done with the same, as these defendants have been informed and believe, except that the said defendants have entered an appearance thereto, and have taken some rule or other proceedings to set aside the return to or the service of the process in said action; and these defendants submit, charge, and show, that the said George W. Thomas, one of these defendants, now is, and since the tenth day of December, eighteen hundred and sixty-eight, has been a citizen of the State of Pennsylvania, domiciled and resident in the city of Philadelphia in said State, and that the said suit, in the said supreme court of the State of Pennsylvania, was commenced, as these defendants are informed and believe, before the granting or issuing of the writ of injunction in this cause, and that this court ought not and will not attempt to restrain the proceedings of these defendants in said suit in the supreme
147 court of the State of Pennsylvania; and these defendants admit that they intend to collect of or account with the executors of said Richard D. Wood for the said renewal fund, which by the said award is required to be paid to these defendants, as these defendants submit they have a full, just, and legal right to do.

And these defendants severally admit that the said Richard D. Wood has recently died testate, and that his will has been proved and letters testamentary have been issued thereon to the executors therein named, or some of them; and these defendants severally deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants, or any one of them; all which matters and things

these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

PETER L. VOORHEES,
Solicitor and of Counsel with Defendants.

STATE OF NEW JERSEY,
Camden County, ss :

George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, being severally duly sworn, depose and say that they are the defendants named in the above answer; that the matters and things therein set forth, so far as they relate to their own acts or the acts of any one of these deponents, are true; and so far as they relate to the acts of others they believe them to be true.

GEO. W. THOMAS.
ALFRED S. PORTER.
N. F. CHEW.

Sworn and subscribed at the county aforesaid this 15th day of November, A. D. 1869, before me, one of the masters in chancery of the State of New Jersey.

JAMES B. DAYTON, *M. C.*

Replication.—Filed December 1, 1869.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without that, that or any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is untrue; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

A. BROWNING,
Solicitor for and of Counsel with Complainant.

148 *Order to bring on hearing.—Filed Jan'y* 4, 1870.

Upon opening the matter to the court on behalf of Peter L. Voorhees, solicitor for and of counsel with the defendants, it is on this fourth day of January, A. D. eighteen hundred and seventy, ordered that the argument of the motion to dissolve the injunction issued in the above cause be heard before the chancellor on the twenty-fifth day of January instant, at the city of Trenton.

A. O. ZABRISKIE, *C.*

Order to bring on hearing.—Filed Jan'y 25, 1870.

Upon opening the matter to the court on behalf of Peter L. Voorhees, solicitor for and of counsel with the defendants, it is on this twenty-fifth day of January, A. D. eighteen hundred and seventy, ordered that the argument of the motion to dissolve the injunction issued in the above-entitled cause be heard before the chancellor on the seventeenth day of February next at Trenton.

A. O. ZABRISKIE, *C.*

Order to close testim'y.—Filed Feb'y 14, 1871.

On motion made in the above-stated cause by Peter L. Voorhees
149 solicitor of the defendants, it is on this fourteenth day of February, in the year eighteen hundred and seventy-one, by the chancellor ordered that the said complainant do close their testimony in the above-stated cause within forty days from this day, so that the said cause may be brought on for hearing at the next term of this court.

A. O. ZABRISKIE, *C.*

Order refusing motion to dismiss and giving time to def't.—Filed May 16, 1871.

This cause coming on to be heard before the chancellor in the presence of A. Browning, esquire, of counsel with the complainants, and P. L. Voorhees, of counsel with the defendants, on a motion the bill for want of prosecution, and the same being heard by the chancellor and duly considered, it is on this sixteenth day of May, eighteen hundred and seventy-one, ordered by honorable Abraham O. Zabriskie, chancellor of the State of New Jersey, that said motion to dismiss be denied, and that the said plaintiffs do have sixty days from this date in which to close their testimony in said cause.

A. O. ZABRISKIE, *C.*

150 *Order refusing motion to dismiss, &c., & giving time to def'ts.—Filed Oct.* 17, 1871.

This cause coming on to be heard in the presence of Abraham Browning, esquire, of counsel with the complainants, and Peter L. Voorhees, of counsel with the defendants, on a motion to dismiss the bill for want of prosecution, or to dissolve the injunction issued in this cause for want of prosecution, and the same being heard by the chancellor and duly considered, it is on this seventeenth day of October, in the year of our Lord one thousand eight hundred and seventy-one, ordered by the honorable Abraham O. Zabriskie, chancellor of the State of Jersey, that said motion to dismiss be denied and said motion to dissolve be denied, and that the said complainants do have thirty days from this date in which to close their testimony in said cause, and that the defendants after the closing of their testimony have liberty to bring on the argument of said cause upon giving ten days' notice of said argument.

A. O. ZABRISKIE, *C.*

Order to speed cause.—Filed April 16, 1872.

Upon opening this matter to the court by Peter L. Voorhees, solicitor for and of counsel with the defendants, it is on this sixteenth day
151 of April, eighteen hundred and seventy-two, ordered that the complainants do speed their cause by bringing on the said cause for argument at the next term of this court, or that in default thereof the said bill be dismissed.

A. O. ZABRISKIE, *C.*

Order to close test'y, &c.—Filed Nov. 8, 1872.

On motion of P. L. Voorhees, esq., sol., &c., it is ordered that the complainants close their testimony in this case by the seventh day of December next, and bring on the argument on the seventeenth day of that

month; and in default thereof that said complainants then show cause why the injunction allowed shall not be dissolved and bill dismissed.

Dated Nov. 1, 1872.

A. O. ZABRISKIE, *C.*

Order denying mo. to dissolve inj'n, &c.—Filed Dec'r 31, 1872, *as of Oct.* 19, 1870.

This cause having been regularly argued before the chancellor on the bill and answer and affidavits annexed to them, respectively, upon the motion in behalf of said defendants to dissolve the preliminary injunction allowed on the filing of said bill of complaint, and the chancellor
152 having taken time until this present October term of the court to consider the same, and being of opinion that the said injunction ought not to be dissolved, it is therefore, on this nineteenth day of October, eighteen hundred and seventy, on motion of Abraham Browning, of counsel with the complainant, ordered that the said motion to dissolve the said injunction be and the same hereby is denied.

A. O. ZABRISKIE, *C.*

Rule for hearing.

It is ordered on motion of , solicitor for and of counsel with , that this cause be set down for hearing on the first day of the next stated term of this court, to be held at the State-house in the city of Trenton, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard thereon; entered by—

153 *Final decree.—Filed April* 22, 1873.

This cause came regularly on to be heard upon the bill, answer, replication, and proofs, at the last February term of this court, in the presence of Abraham Browning and Benjamin Williamson, of counsel with the complainant, and of Peter L. Voorhees and Theodore Cuyler, of counsel with the defendants, and the said pleadings and proofs having been read, and the several arguments of said counsel heard thereon, and the chancellor having taken the time since the hearing to consider the same, and now, upon full consideration thereof, being of opinion that the proceedings of the arbitrators, after the two original arbitrators, Henry F. Kenney and Matthew Baird, failing to agree on an award, had selected Rufus A. Wilder as a third arbitrator, in not giving notice of such selection to the parties, and in refusing to hear them or their witnesses, as averred in the bill of complaint and established by the evidence, was such misconduct in said arbitrators as to vitiate the award, unless they were justified in such proceedings by an agreement of the parties, as set up by said defendants in their answer, but which, in the opinion of the chancellor, they have failed sufficiently to prove; and the chancellor being also of opinion that the evidence clearly establishes that the parties were refused a hearing before the third arbitrator, after he had been selected upon, it may be the belief that an agreement had been made that the case should be submitted to such third arbitrator, if one should be chosen, upon the evidence as taken down by the stenographer, with the exhibits and upon the written arguments of counsel of both parties; and that the argument of both the counsel of the defendants was submitted to, read, and examined by the third arbitrator, but that the entire written argu-

ment of one of the counsel of the complainant, and a part of the argument of their other counsel were never submitted to, read, or examined by said third arbitrator; and the chancellor being of opinion that making the award by two of said arbitrators upon the full hearing of the counsel on one side, but as to one of said arbitrators without hearing both counsel on the other side in full, was also such misconduct by them as to vitiate said award; and the chancellor being further of opinion that for the aforesaid misconduct by and on the part of said arbitrators, the said award should be set aside:

It is, therefore, on this twenty-second day of April, in the year of our Lord one thousand eight hundred and seventy-three, at Trenton, on motion of Abraham Browning, counsel of complainant, ordered, adjudged, and decreed by the honorable Abraham O. Zabriskie, chancellor of New Jersey, and the said chancellor, by virtue of the power and authority of this court, doth order, adjudge, and decree, that the said award mentioned in said pleadings, made by Matthew Baird and Rufus A. Wilder, two of said arbitrators, and bearing date the twenty-ninth day of June, eighteen hundred and sixty nine, be and the same hereby is, in all things, set aside, vacated, and for nothing holden.

And it is further ordered, adjudged, and decreed, that the said defendants pay to the complainant the costs of said complainant in this cause to be taxed.

A. O. ZABRISKIE, *C.*

154 I, Henry S. Little, clerk of the court in chancery of the State of New Jersey, do hereby certify that the foregoing is a true transcript of the enrollment in the cause wherein the West Jersey Railroad Company is complainant and George W. Thomas and others are defendants, taken from book A 10, page 538, &c., of enrolled decrees, now on the files of my office.

In testimony whereof I have hereto set my hand and affixed the seal of said court at Trenton, this twelfth day of October, A. D. eighteen hundred and seventy-six.

[SEAL OF COURT.] H. S. LITTLE, *Clk.*

I, Theodore Runyon, chancellor of the State of New Jersey, do hereby certify that Henry S. Little, whose name is subscribed to the above certificate, was at the date thereof and now is the clerk of the court of chancery of the State of New Jersey; that said certificate is in due form, and the seal thereto attached is the seal of said court, and that the signature of the said Henry S. Little is in his proper handwriting.

Witness my hand at the city of Trenton this twelfth day of October, A. D. eighteen hundred and seventy-six.

THEODORE RUNYON.

155 *Bond sur writ of error.*

In the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit. October session, 1875.

THOMAS ET AL.
vs.
THE WEST JERSEY RAILROAD COMPANY. } No. 94.

Know all men by these presents that we, George W. Thomas and Alfred S. Porter, as principals, and Jerome E. Sharp, Apsley street, Germantown, and Harry Porter, No. 1906 North Tenth street, city of Philadelphia, as sureties, are held and firmly bound unto the West Jersey

Railroad Company in the full and just sum of five hundred dollars, to be paid to the said The West Jersey Railroad Company, its certain attorney, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and
156 dated this thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew and the said The West Jersey Railroad Company, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said The West Jersey Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at the city of Washingtan, D. C., the second Monday of October next ensuing:

Now, the condition of the above obligation is such, that if the
157 said George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew shall prosecute their writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) GEO. W. THOMAS. [SEAL.]
(") J. E. SHARP. [SEAL.]
(") HARRY PORTER. [SEAL.]
(") ALFRED S. PORTER. [SEAL.]

Witnesses:
SAMUEL BELL.
WM. A. WILLIAMSON.

Approved.

W. McKENNAN,
Cir. Judge.

(Endorsed:) No. 94. October sess., 1875. C. C. U. S., E. D. of Pa. Thomas et al. vs. West Jersey R. R. Co. Bond sur writ of error. Filed April 30, 1877.

158 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of Thomas et al. vs. The West Jersey Railroad Company, No. 94, October session, 1875, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this third day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of these United States the 101st.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsement on cover:) No. 169. George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, pl'ffs in error, vs. The West Jersey Railroad Company. E. Penna. C. C. U. S. Filed 16th August, 1877.

ADDITION TO RECORD No. 169.

1 Sup. C'r't United States.—Oct. sess., 1879.

THOMAS ET AL.
v.
THE WEST JERSEY R. R. Co. } No. 169.

We agree that the annexed certificate of order for judgment nunc pro tunc, and of entry of judgment pursuant to the same, shall form a portion of the record of the above cause in the Supreme Court of the United States, and request the clerk of said court to have the same printed and inserted in place in the printed record.

GEO. W. BIDDLE,
Of Counsel of Record for Plaintiff.

NOV. 28TH, 1879.

SAM'L DICKSON,
Of Counsel of Record for Defendant.

NOV. 28TH, 1879.

2 In the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit. October sess., 1875.

THOMAS
vs.
THE WEST JERSEY R. R. Co. } No. 94.

And now, this 13th day of November, A. D. 1879, it having appeared to the court that the entry of judgment in the above case was inadvertantly omitted, and counsel for the plaintiffs and defendants having consented that the judgment shall be entered nunc pro tunc, it is ordered that the clerk enter judgment for the defendant as of the 18th day of April, A. D. 1877.

(Signed) SAM'L DICKSON,
For Pl'ff.

(Signed) A. SIDNEY BIDDLE,
For Defendants.

NOV. 13, 1879.

I, Samuel Bell, clerk of the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, do
3 hereby certify that upon filing the above stipulation of counsel and order of court judgment in favor of defendant was entered as of April 18th, 1877.

In witness whereof I have hereunto set my hand and the seal of the said court at Philadelphia, this 28th day of November, A. D. 1879, and in the 104th year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk Circuit Court U. S.

(Endorsed:) Sup. Court U. S. 1879, October term. No. 169. George W. Thomas & al. pltf's in error, vs. The West Jersey Railroad. Stipulation of counsel and addition to record. Filed 1st December, 1879.

No. 169. October Sessions, 1879.

IN THE SUPREME COURT
OF THE UNITED STATES.

GEORGE W. THOMAS, ALFRED S. PORTER, and NATHANIEL F. CHEW, Plaintiffs in Error,

vs.

THE WEST JERSEY RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF THE PLAINTIFFS IN ERROR.

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A. SYDNEY BIDDLE,
PETER L. VOORHES,
GEORGE W. BIDDLE,
Of Counsel with Plaintiffs in Error.

Allen, Lane & Scott, Printers, 233 South Fifth Street, Philadelphia.

STATEMENT OF THE CASE.

This was an action of covenant, brought in the Court of Common Pleas, No. 1, of Philadelphia county, by George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, against the West Jersey Railroad Company. The suit was removed by the defendants into the Circuit Court of the United States for the Eastern District of Pennsylvania.

On the eighth day of October, 1863, the Millville and Glassboro Railroad Company, a corporation incorporated by the Legislature of New Jersey March 9th, 1859 (34–40),* entered into an agreement (29–34) with the plaintiffs, Thomas, Porter, and Chew, and with one Richard D. Wood, whereby it was agreed that the railroad company should, and did thereby, lease their road, buildings, and rolling stock (29), &c., to the plaintiffs for twenty years from the 1st of August, 1863 (34), for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period (31). It was further agreed (32) that the railroad company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiffs so desired, the railroad company would appoint an arbitrator, who, with an arbitrator appointed by the plaintiffs, should "*decide upon the value of the contract to the plaintiffs, and the loss and damage incurred by, and justly and equitably due to them, by reason of such termination thereof.*"† In the event of a difference of

* The numerals in brackets refer to the pages of the printed record.

† The italics throughout the brief are ours.

opinion between the arbitrators, they were to choose a third, and the decision of a majority was to be "final, conclusive, and binding upon the parties thereto" (32–3).

On the 10th of April, 1867, the Legislature of New Jersey passed an act entitled "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company.'" It was therein enacted that it should be unlawful for the directors, *lessees, or agents of said railroad* to charge more than sums therein named for passengers and freight respectively (40). At the date of the passage of this act *it was well known that the plaintiffs were lessees acting under the agreement of lease of 8th October, 1863* (27).

On the 12th of October, 1867, articles of agreement were entered into (44–5) between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendants, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Millville and Glassboro Railroad Company upon the plaintiffs (27–49), putting an end to the "contract and to all the rights thereby granted and (notifying them that the company would) retake possession of the railroad * * * on the first day of April, 1868" (49).

On the 18th of March, 1868, the Legislature of New Jersey passed an act (41–44) whereby it was enacted that, upon the fulfillment of certain preliminaries, the Millville and Glassboro Railroad Company should be consolidated (42) with the West Jersey Railroad Company, "subject to all the debts, liabilities, and obligations of both of said companies." The conditions required by the act of 18th March, 1868, were fulfilled (28), and the railroad, &c., was duly delivered by the plaintiffs to the West Jersey Railroad Company on the 1st of April, 1868 (27).

On April 13th, 1868, and again on May 22d of the same year, notices to arbitrate according to the terms of the agreement (48–9) were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company (28). The latter company refused to comply with the terms of either notice (28); but subsequently, on the 21st of December, 1868, an agreement of submission (50–2) was entered into between the plaintiffs and the West Jersey Railroad Company, whereby Messrs. H. F. Kenney and Matthew Baird were appointed arbitrators, with power to choose a third, to settle the controversy between the parties (28). These arbitrators disagreeing (55) called in a third, who joined with Mr. Baird in an award (53–6), by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof, to and by the plaintiffs, was adjudged to be the sum of one hundred and fifty-nine thousand four hundred and thirty-seven dollars and seven cents ($159,437.07), and the West Jersey Railroad was ordered to pay that sum to the plaintiffs (55). This award was subsequently set aside by Chancellor Zabriskie (102–3), in a suit in equity brought in New Jersey (56–69); the court being of opinion that as there had been no oral argument before the third arbitrator, and as the written argument of the defendants, Thomas, Porter, and Chew, but not of the complainants, the West Jersey Railroad Company, had been submitted to the third arbitrator and read by him, the award could not stand. The chancellor was also of opinion that the appointment of the third arbitrator should have been made known to the parties, and that each party should have had a hearing if desired, before all three arbitrators, which had not been done (102–3). The decree setting the award aside was affirmed by the Court of Errors and Appeals of the State of New Jersey, 24 New Jersey Reports, 567–74.

This suit was brought upon the defendants' breach of covenant to pay the plaintiffs the value of the contract of lease at the time of its termination, and upon their refusal to appoint arbitrators, &c. (See the six counts of the declaration, 3–26.)

Upon the trial of the cause the plaintiffs offered to prove all of the aforesaid facts, to show that they had in all respects complied with the terms of the lease, and to prove the value of the lease to them, and the loss and damage they had sustained by reason of its termination as aforesaid. (See the various offers, 26, 28.) The court excluded the whole of this testimony (on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was *ultra vires*), and directed a verdict for the defendants (28).

ASSIGNMENTS OF ERROR.

1. The court below erred in excluding from the consideration of the jury the evidence contained in the plaintiffs' first offer, namely, the contract and agreement between the Millville and Glassboro Railroad Company and George W. Thomas and others, plaintiffs, dated the 8th October, 1863. The acts of Assembly of New Jersey, one of them an act to incorporate the Millville and Glassboro Railroad Company, approved the 9th of March, 1859, and another of them an act entitled "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company,' passed the tenth day of April, 1867," and the acts referred to therein; and also the fact that it was well known at the date of the last-named act, that the plaintiffs were lessees acting under the said contract and agreement, together with all other acts of the Legislature of the State of New Jersey relating to the West Jersey Railroad Company, and to the Millville and Glassboro Railroad Company; that

George W. Thomas and others, the parties of the second part in the afore-mentioned agreement, dated October 8th, 1863, had performed the duties imposed upon them by the terms of the said agreement until the first day of April, 1868, at which last-named date they ceased to act under the said agreement in consequence of a notice given to them by the parties of the first part under the terms of said agreement in the previous month of November, 1867.

2. The court below erred in refusing to admit in evidence the testimony contained in plaintiffs' second offer, namely, the notice given by the Millville and Glassboro Railroad to the plaintiffs without date; and that the said notice was received by the plaintiffs on or about the 8th of November, 1867, and that in pursuance thereof, the plaintiffs delivered up possession of the property mentioned in said notice, and fully complied with the terms of the same.

3. The court below erred in refusing to admit in evidence the testimony, and each and every item thereof, contained in plaintiffs' third offer, namely, an act of Assembly of the State of New Jersey, entitled "An act to consolidate the railroad lines of West Jersey," approved March 18th, 1868, also, agreement dated 12th October, 1867, between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company; also, the deed of April 1st, 1868, from the Millville and Glassboro Railroad Company to the West Jersey Railroad Company; also to prove the consent of the stockholders of both companies, as provided by the said act of the Legislature of New Jersey of March 18th, 1868; also, the notice from plaintiffs to Thomas H. Whitney, president of the said Millville and Glassboro Railroad Company, dated April 13th, 1868; also, that the said

paper was delivered to said Whitney on the said last-mentioned day; also, that said Whitney, on or about the said last-mentioned day, delivered the said notice to Thomas J. Yorke, then president of the West Jersey Railroad Company; also, a notice of the said plaintiffs to the said Millville and Glassboro Railroad Company, dated May 22d, 1868; and to show that the same was delivered by the plaintiffs to the said West Jersey Railroad Company on or about the said last-mentioned day; also, that the said West Jersey Railroad Company refused to comply with the terms of either of the said notices of April 13th, 1868, and of May 22d, 1868; also a certain submission, arbitration, and award in proceedings between the plaintiffs and defendants; also, proceedings in the Court of Chancery of New Jersey, between the present plaintiffs and defendants; and the judgments and decrees of the courts thereunder, together with the performance by the plaintiffs, and each of them, of all the things they, and each of them, were bound to perform under the said agreement of October 8th, 1863, and the value of the said contract to them, and the loss and damage incurred by and justly and equitably due to them, by reason of the termination of the said contract, under the seventeenth section thereof, as set forth under the said notice served November 8th, 1867, as aforesaid.

4. The court below erred in directing the jury that their verdict must be for the defendants.

5. The court below erred in entering judgment upon the verdict for the defendants.

BRIEF OF ARGUMENT.

I. The contract of 8th October, 1863, was *intra vires* of the Millville and Glassboro Railroad Company, because authorized by the act of incorporation.

First.—It was expressly authorized.

By section 13 of the agreement (38) it was enacted: "That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts."

Is it the meaning of this clause to authorize the contract entered into? It was argued for the defendants that the contract contemplated was a contract for the conveyance of goods and passengers beyond the Millville Company's termini, or a contract permitting an express company to do a portion of the transportation upon the Millville Company's line; but we are not at liberty thus to limit general language.

The true test is this question: Supposing the legislature to have had a contract of lease in view, and to have purposed authorizing it, have they used language which will embrace such an object? What can be more appropriate to the purpose of leasing than the terms employed? During the continuance of its charter the corporation *may make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kind of goods, produce, merchandise, freight, or*

passengers. The contract is not limited to points beyond their line. Nor can such intention be supposed in the legislature, for such contracts are clearly incidental to the general purposes of the corporation, and the express permission to execute them would have been futile. The same may be said of contracts with others, whereby the Millville Company allowed the use of their own line or rolling stock to other individuals or corporations, to do an express business thereon, or for running powers. Such contracts were lawful without express authority. We must, therefore, suppose that when the Legislature of New Jersey used the foregoing language in a charter, it was to confer a power otherwise withheld, or the implied grant of which might be seriously doubted. As, therefore, there is no restriction to mere running powers by other lines or persons over the Millville road, or to contracts for transportation beyond the line; as the language used is amply comprehensive and exactly applicable to such a contract as was made, and as the probable making of such a contract may be presumed to have been present to the legislature when the law was passed, we must infer that the necessary power was expressly given because it was so intended. That the parties supposed this a sufficient authority appears from the fact that this very language is incorporated (see page 29) in the lease.

No stronger argument in favor of the view advanced as to the meaning of section 13 of the act of incorporation of the Millville R. R. Company (38) can be made than that implied in the language of the act of 10th April, 1867, entitled "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company,'" (40). The language of this act is as follows:—

"*First.*—Be it enacted by the Senate and General Assembly of the State of New Jersey, that it shall be

unlawful for the directors, *lessees*, or *agents* of said railroad, to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one-half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: *Provided*, That nothing contained in this act shall deprive the said railroad company, *or its lessees*, of the benefits of the provisions of an act entitled 'An act relative to freights and fares on railways in the State,' approved March 4th, 1858, and applicable to all other railroads in this State.

"*Second.*—And be it enacted, that this act shall take effect immediately. Approved, &c."

The contract in question was executed on October 8th, 1863, and the property of the Millville and Glassboro Railroad Company was immediately handed over to the plaintiffs, the defendants ceasing thenceforth to have any control (other than that provided in the contract) over the said railroad, or property. The railroad had been publicly operated by the plaintiffs from that date without notice or suspicion that the contract was to be terminated. The agreement to consolidate, made by the West Jersey Company and the Millville and Glassboro Railroad Company, was executed on the 12th of October, 1867 (44–5), and the notice to terminate the lease was sent to the plaintiffs November 8th, 1867 (28). Months prior to either notice or agreement, namely, on April 10th, 1867, while the plaintiffs are in open and obvious possession of the railroad and rolling stock, and operating the road, the legislature passes an act in which it twice speaks of the *lessees* of the railroad, and pointedly distinguishes them from the corporation itself. No

future lessees are contemplated, for the act is to go into effect immediately, and it will not be contended that by the word *lessees* the West Jersey Company was intended, inasmuch as the act was passed six months before the articles of agreement between the companies were executed; besides which, those articles provided not for a lease of the Millville Company by the West Jersey Company, but for a consolidation of the two corporations (44–5). The legislature supposed, as did the plaintiffs, the Millville Company, and their respective counsel, that the language of the thirteenth section (38) of the act to incorporate the Millville Company was an express authority to that corporation to execute the contract sought to be avoided. Accordingly when the supplemental act is passed exactly appropriate language is used to confer not only upon the company, but on the plaintiffs, its then lessees, or agents, the authority given by the act; and the context, taken in connection with the notorious fact of the possession and operation for the four preceding years of the road by the plaintiffs, demonstrates that the legislature used the appropriate word *lessees*, in view of the then existing operation of the road by *lessees*. That the operation of the Millville Railroad by the plaintiffs *under the agreement of lease* was well known at the time of the passage of the act of 10th April, 1867, was a fact offered in evidence. If we were permitted to speculate, we should doubtless conclude that the act of 10th April, 1869, was drafted after consultation with the plaintiffs' counsel, or perhaps with the plaintiffs, or some of them, in person, and we can not but infer that the legislature supposed that authority to execute the then existing contract had been amply given in the act of incorporation.

Secondly.—The contract in question was impliedly authorized by the act of incorporation.

It has been assumed that the contract under discussion was an ordinary contract of lease. This view, however, is not sustained when its language is examined. The agreement was, in fact, a mere appointment of agents or employés to run the road, making it for their advantage to economize, and to advance the interests of the road by paying them upon a sliding scale. It is quite true that the words *lease* and *lessees* were employed, but the terms of the agreement showed that the plaintiffs were in no respect lessees in a legal sense.

SECTION 22. It was confined to twenty years (34).

SEC. 17. The Millville Company could put an end to the contract and retake possession upon three months' notice (32).

SEC. 16. The death of either of the so-called lessees (*ipso facto*) put an end to the contract (32).

SEC. 15. The omission to make the regular payments put an end to the contract (32).

SEC. 6. The plaintiffs must forthwith discharge from their employment any persons employed by them whom the Millville Company, through its directors, should wish removed (30).

SEC. 9. The plaintiffs were to pay one-half the gross amount received to the Millville Company (31).

SEC. 10–11. They were to secure their covenant to keep the rolling stock, &c., in good repair by depositing yearly a sum of $10,000 with a trustee, who acted as agent for the Millville Company (31).

SEC. 12. This fund was to be appropriated for repairing and replacing the track, road-bed, and rolling stock. *And this appropriation was made under the directions of the Millville Company;* for it was provided that in case of dispute as to what were current repairs (into which no portion of this fund was to go), and what were repairs to perpetuate the road and rolling stock, *the matter was to be settled by an agent of the Millville Company* (31–2).

SEC. 14. *This fund was to be applied by the trustee upon the order and to the purposes designated by the directors of the Millville Company, and for no other purpose whatever* (32).

What definition of a lease can be framed which will comprehend such an agreement as this? This was in truth an appointment of three agents to take charge of a small road a few miles long. The appointment (or what was equivalent thereto—the right of removal) of all other employés was reserved to the Millville Company. They could terminate the contract at any time, merely giving the plaintiffs convenient notice to close their affairs. The contract was personal with these three men. Suppose the owner of the good-will of a hotel were to place an active business man in charge of it under such an agreement. Would such an appointment, personal to the agent, who was paid on a sliding scale, that he might be interested in improving the business, be held to be a lease? Upon what principle can it be treated as beyond the corporation's power? It will be observed that there is in the act of incorporation no express grant to the corporation, much less obligation resting upon them, to act as carriers. They are expressly authorized and directed to construct the road, and they are directed to keep in repair certain bridges, and to con-

struct or have constructed engines and cars; but beyond the incidental statement in section 15 (38) "that when five miles or more of said road shall be completed, the said company may commence running cars, for the transportation of passengers and freight, enjoying all the privileges and subject to the restrictions created by this act," there is not a word authorizing, much less directing, the corporation as such to transport between their termini. If so important a function is to be implied from the general terms of the act of incorporation, it would seem not unnatural to suppose that the mere mode of operating the road by the appointment, during the corporation's will, of three skilled men as the company's agents, was left by the legislature to the discretion of the shareholders.

In Featherstonhaugh *vs.* Lee Moor Porcelain Clay Company, L., R., 1 Equity Cases, 318, 331, 334 (Vice-Chancellor Sir William Page Wood), 1865, a company which had been incorporated for the working, preparation, and sale of porcelain clay, with power to combine mining operations therewith, had been unsuccessful in business. At a general meeting the directors were authorized to make a valid mining lease for twenty-one years of the whole of the works and buildings of the company. A bill was thereupon brought to set aside the lease. By the company's deed a majority of two-thirds in number of the shareholders at an extraordinary general meeting were authorized to empower the directors to bind the company and every shareholder thereof to any act, &c., which the company, by virtue of its corporate capacity or otherwise, or all the shareholders together, would be enabled to do, if the consent of every shareholder were given, and the directors were to have power to make contracts, which, whether it was within their competence or not, should, if sanctioned at an extraordinary general meeting, be binding upon every shareholder, as if he had consented.

For the complainant it was argued that by the act of Parliament, the company must state to the legislature for what it was incorporated, and could not deviate from that purpose; that persons having associated for one purpose, and having bound themselves by their deed to carry that into effect, could not bind themselves to another which was an engagement to carry out a totally different purpose; that the contract of lease was, in a word, *ultra vires*. The Vice-Chancellor dismissed the bill, admitting that if the contract by the company had been wholly independent of the objects of the company, as, for instance, to engage in the working of a coal mine in Australia, the agreement would have been *ultra vires*. The test he said (at 329) was this:—"Have the company by this act, which they intend to carry into effect by force of the clause, either on the one hand abandoned their purposes * * * or on the other hand, exceeded their purposes? Have they done either one or the other?

"It appears to me they have not abandoned the purposes of the company. They have granted a lease for twenty-one years, and, so far, they have agreed to take a rent for their property instead of working it themselves and taking the profit. At the end of twenty-one years they are to have the whole of the property back, and, as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case), they would have it back in a more profitable condition at the end of the twenty-one years. *They have not exceeded their powers, because nobody can contend that parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business.* But, as to that view, I apprehend that it is perfectly competent for a meeting to say: 'China clay is in a very depressed state—the market is very bad—and we agree it is better not to work it for two or three years.' That would be entirely within their functions, and they would

not be said, in that respect, to have abandoned their work, or to have exceeded the functions allowed them * * * * * * * *

"The lease is not for the whole term, but only for twenty-one years, leaving fifty years to come afterwards; and here is a person who comes forward and says: 'I will take your discredited concern, which has not paid for nine years—a thing which nobody will take shares in—which is on the very verge of dissolution—upon which will ensue a total break-up, with large debts on a concern not likely to find a customer. I will indemnify you against all charges, relieve you from all burdens, give you a clear profit of some hundreds a year, and at the end of twenty-one years engage to leave you the property in a much better condition than I find it.' * * * * If I had the whole body of shareholders *sui juris* (for that is the object of the clause), could I hold that I could restrain the whole body from entering into any arrangement for leasing their property and disposing of it in the manner described? I apprehend that, so far from that, if they had not been *sui juris*, the court would, in such a case, have been very glad to give them its assistance."

This case is applicable to the present. The Millville and Glassboro Railroad Company could have abandoned the work of their railroad if it had proved to be unprofitable. There was, as we have seen, no clause compelling them to act as carriers, besides which they were expressly declared (34; section 1 of their act of incorporation) to be "capable of purchasing, holding, *and conveying* any lands, tenements, goods, and chattels whatsoever necessary or expedient for the object of this incorporation." It was, in fact, because it could, as the event showed, be much more profitably worked by the present plaintiffs than under the former organization, that the lease was made. What was this, therefore, but

a more advantageous administration of the road by the corporation? The cases that will be cited by the other side are wholly inapplicable. This is not a lease by one railroad to another of its road and franchises, whereby other roads are debarred of the advantage of the use of the leasing road for rights of connection, running powers, and proper traffic arrangements. There was nothing in this contract to prevent the continuation of any facilities to another road in the State of New Jersey, which existed prior to the execution of the contract. Any arrangements with any road to the advantage of the corporation would have been, and were, entered into by the plaintiffs. The latter were in no sense rivals of, but were, on the contrary, identified in interest with, the railroad corporation; and even if a mistake in judgment had been committed by them, the control of the road was resumable at pleasure by its owners upon a notice hardly longer than that which is given to a domestic servant.

Nor was there any injustice in the agreement. In many of the English cases one of the criteria of *ultra vires* in traffic arrangements or for running powers, has been whether the agreement was a permanent one, and if so, whether the agreement is too one-sided to be considered a fair one on behalf of the company, a shareholder of which seeks to have it set aside. Thus in some cases the length of the term (as for example one of nine hundred and ninety-nine years) has been adverted to, and in others the fact that the compensation was fixed, no matter what increase there might be in the travel and business of the leased road. But these objections do not exist in the slightest degree in the present case; for the arrangement was terminable at pleasure, and the rate paid was much more than what the shareholders themselves would have been entitled to receive if the plaintiffs had not acted as their agents. It will be

remembered that one-half of the gross receipts was paid over to the directors of the railroad company, the whole of which sum might be used as dividends. No such dividend is paid by any railroad corporation in the United States. It is well known how small a proportion net receipts, where they exist at all, bear to gross receipts, yet by this agreement dividends were always declarable, whether the plaintiffs ran the road at a profit or not. The agreement was, in fact, to pay over everything received, excepting half the gross receipts, out of which all the current running expenses of the road, and the salary of the plaintiffs, were paid. Not only this, but a very large sum was set aside to keep the rolling stock in good order, and one which proved much more than sufficient for that purpose.

In the case of The Midland Railway Company *vs.* The Great Western Railway Company, L. R., 8 Ch. App. Cas., 841, 851, 852, 856, 857 (1873), a bill was filed by the Midland Railway Company to enable it to run trains through a station belonging to the defendant company over the Hereford Company's line (which latter company ran into the defendants' line at Barton Junction); the plaintiff company having Parliamentary powers to use the defendants' station at this place. The Hereford Company had applied to Parliament for power to lease their line to the Midland Railway Company, the plaintiff, but through the opposition of the defendants the proposed bill had been thrown out. The Hereford Company then entered into an agreement with the Midland Railway Company, terminable on six months' notice, by which they agreed to allow the latter the use of the Hereford line and all its stations, sidings, &c., and to afford them every facility for so doing; the plaintiffs were to keep the line in repair, and bound to pay their own officers, and were to fix the rate of fares for through traffic, paying to the Hereford Company a proportion of

the through rates and fares by way of commuted toll. The plaintiffs, the Midland Railway Company, *further agreed that, if the Hereford Company should desire them to do so, they would undertake the local traffic also of the Hereford line, paying that company a proportion of the fares.* The Master of the Rolls held that the agreement between the plaintiffs and the Hereford Railroad Company was *ultra vires*, and that this was an available defense in the suit. The Lords Justices JAMES and MELLISH reversed the decree, holding that the agreement was within the powers of the plaintiffs. Lord Justice JAMES said that "having heard the arguments that have been addressed to us on the part of the defendants, the Great Western Railway Company, and having read and considered the judgment of the Master of the Rolls, I am bound to say I have arrived at the conclusion, without any doubt whatever in my own mind, that there is nothing whatever in this agreement that is illegal, or that is in any way beyond the powers of either company, or that is in any sense against that very elastic phrase, public policy. The Midland Railway Company and the Hereford Railway Company enter into arrangements which, upon the face of them, seem to me to be perfectly consistent with every obligation of either company. * * * *

It is said they are going to delegate their authority, or some of their powers, to the Midland Company; that it is in effect a lease or a transfer or a delegation of the powers of the Hereford Company to the Midland Company. I see nothing whatever in this agreement which amounts to any such delegation. *I agree that practically, the Hereford Company will for the present, and it may be for a long time, having provided for the convenience of the public and their own profit in the way they have done, find it not worth their while to set up carriages of their own, and become carriers upon their own line.* They are not obliged to become carriers, and if ever it shall appear to the directors

of the Hereford Company, or their shareholders, that it will be for their convenience to be carriers themselves, there is nothing in this agreement which either expressly or impliedly throws the slightest difficulty or obstruction in the way of their becoming such carriers. And supposing any other company were minded to use this line of the Hereford Company, there is nothing in this agreement which prevents the Hereford Company from making an exactly similar agreement with other companies. * * * And if the Hereford Company should be unwilling to enter into such agreement, it is open to any one of those companies to compel, under the general law, the Hereford Company to give all the facilities which the law compels one company to give to another. And if a private proprietor of mines, or the owner of works, or any landowner adjoining the line, should be minded to make a branch into the line from his land, there is nothing to prevent his enforcing that right, and there is nothing in this agreement which appears to me either expressly or impliedly to give the Midland Company a voice in the performance of any one of the duties which will be cast upon the Hereford Company under those circumstances. The Hereford Company are bound to work and maintain the line, and to provide everything requisite for the convenience of the public; and they would be liable to a mandamus if they omitted to perform any duty cast upon them, and I can see nothing whatever in this agreement which transfers to the Midland Company one single duty of any kind whatever which the law has cast upon the Hereford Company. * * * Another clause upon which much stress was laid was the ninth clause, in which it is said that the Hereford Railway Company contemplate not having the local traffic. Possibly there might have been an objection to the clause if they had bound themselves not to put on any trains, but there is nothing here whatever to preclude them from putting on

their own trains for the purpose of carrying their own traffic. Then again it is said there is something in the clause with reference to the claims for compensation which is in some way against the policy of the law. I am unable to see anything whatever objectionable in that. It provides that the claims for compensation shall be satisfied by the company deriving the profit from the traffic, that is, the Midland Company, with regard to the through traffic; and the claims for compensation arising from the local traffic, which belongs to the Hereford, are to be settled by arbitration between them, having regard to the respective profits they were getting from it. * * *

"Then it is said we ought not to be blinded by the language of the agreement; that the agreement is drawn cunningly and craftily for the purpose of appearing to be legal, whereas there was a private understanding and knowledge on the part of both parties that practically it would give to the one company a monopoly of the other just as fully and completely as if it had been a lease. I am unable to follow that line of argument. Were we considering an agreement between two companies who can only bind themselves, and only express their will by instruments under their common seal, I can not conceive how their mind is to be ascertained by anything which has been said by the directors of the one company or of the other, or by anything that has passed between the agents or solicitors, or by any guess that we can make as to what the motives of those persons were. I can not see how we can import into that which alone binds the companies, the agreement under their common seal, anything not to be found on the face of the agreements, or fairly to be implied from them. I do not think any of the cases that have been cited have really gone outside the document itself for the purpose of arriving at the conclusion that there is something against the policy of the law in what it contains. Being

of opinion that this agreement is not *ultra vires*, and that there is nothing illegal in it, or against public policy, so far as that is an intelligible phrase, * * * * I am of opinion that * * * * the plaintiffs are entitled to the injunction which they have asked."

On page 857 Lord Justice MELLISH said, "But then it is said here, though the agreement may not bind them to give it up, yet it is clear that the practical effect of it would be that the whole would be given up, [*i. e.*, the whole local traffic of the Hereford Company,] but does that make it an illegal agreement? I will assume, and it is probable enough, though perhaps not strictly proved, that they went to Parliament to get power to lease the Hereford Line to the Midland Company, and that having been refused they did what I think is very natural they should do in such a case; they laid instructions before some competent counsel, and said, Draw us an agreement which will be legal, and shall as far as possible carry out our intentions. That is what I should suppose they did, and, in my opinion, whoever was employed to do that has done it successfully. He has drawn what appears to me to be a legal agreement.

"A great deal has been said about the 'policy of the act of Parliament' and about the 'policy of the law;' but you can not find out the policy except by reading the act and seeing what has been enacted in it.

"What is it that the act of Parliament has done? It has not made it compulsory on a railway company to act as carriers on their own line. *Yet Parliament must be taken to have known, what is beyond all question the truth, that there may be comparatively short railways forming part of through lines* of communication between important places, having no great and important traffic of their own, which can not practically be worked by their own company at a profit. Looking at the map it appears to

me extremely probable that the Hereford Company is in that position—that a large portion of their traffic—almost all of it, depends on the through traffic. * * * * Then can it be said that it is illegal because it happens that there is only one railway company which desires to make such an agreement with them? I can not see how that makes it illegal. It may be in that sense contrary to the policy of the law that a railway company shall give up its entire powers of working to another company, and shall prevent itself by contract from allowing other companies and persons to use its railway besides the particular railway company with whom it makes the contract. But then supposing a railway company is in such a position that it can not practically work its own line with a profit, and can practically get no other company except one to enter into a working agreement with it, does that make it illegal? Is it the policy of the law that the railway shall remain unworked, or is it more consistent with the policy of the law that if there is only one company which is practically willing to work it, it shall make an agreement with that company? Well, then, of course if they are not bound to work themselves, and if there is only one company willing to make a working agreement with them, the practical consequence must be that the one company will have the working of the whole line. Surely that can not make the agreement illegal. I can not allow that it is the same thing, whether there is an agreement which practically amounts to a lease, and which by contract prevents them entering into an agreement with other companies, and an agreement like this, which has no such exclusive clause in it; although it may be that that company alone will work the line. The difference is this, that at any moment at which the Hereford Company think it for their advantage to work their own line or think it to their advantage to enter into a contract with any other

company, there is nothing in the agreement to prevent them from doing so * * * * *."

This case is *a multo fortiori* to ours. In the case cited, after a power to lease had been refused by Parliament, an agreement was held valid, whereby one company had the power to intrust, if it desired to do so, the exclusive management of the road to another company, for by the terms of the agreement the Hereford Company were entitled to call upon the Midland Company to do the whole local business over the Hereford road. Several considerations were suggested whereby it was alleged the agreement was *ultra vires*, but the court decided otherwise. Admit, says Lord Justice MELLISH, that the Hereford Company will, for a long time to come, find it not worth their while to set up carriages of their own and to become carriers upon their own line; that does not make the agreement *ultra vires*, for they can resume their delegated powers whenever it is for their convenience to do so. In that case it will be remembered the agreement was to be terminable upon six months' notice, whereas in our case three months is the time named. Moreover, if the Hereford Company required the Midland Company to take charge of their local traffic they would have been bound to give the Midland Company notice of their intention to put an end to that optional arrangement, and no court would hold three months too short a notice. In our case not even the rolling stock was to be supplied by the plaintiffs. The Millville Company's rolling stock was to be used, and was to be continually kept up by a trustee of the company with funds provided by the plaintiffs, and the plaintiffs were merely to supply such additional rolling stock as might from time to time become necessary. Another reason why the agreement was within the powers of the company in the last cited case was that there was nothing to prevent the Hereford Company from making an exactly similar running arrangement

with any other connecting company. Nor is there in our case. In the cited case the Hereford Company had not only provided that at its option the Midland Company was to do the whole of the Hereford Company's local traffic, but also agreed to give the Midland Company certain running powers over their line. This, said the Lord Justice (*i. e.*, the running powers), could have been entered into by the Hereford Company with any other connecting road; it did not give the Midland Company as a company an exclusive right to the use of these running powers. Nor is there aught in the agreement here to prevent this privilege from being granted to other companies, inasmuch as the Millville Company was entitled, at its option, to terminate the agreement, and could thus instantly compel the plaintiffs to make any agreement that was desired. Nor was the fact that the operating company was unable to fix the fares considered of any weight in the cited case. Stress was also laid upon that clause by which the Midland Company undertook to do local traffic for the Hereford Company. *Possibly*, said Lord Justice JAMES, there might have been an objection to the clause if they had bound themselves not to put on any trains, &c.

In our case the plaintiffs were wholly under the Millville Company's control by the right of the latter to terminate the agreement, and in the cited case, if the Hereford Railroad Company had called upon the Midland Company to do the local business, they could not, until that arrangement was modified, have interfered by adding to or diminishing the local trains. But the language used by the Lord Justice would indicate that in any event he did not consider the objection a forcible one. Lord Justice MELLISH referred to the fact of the Hereford Company being a short local road, having no great and important traffic, which, perhaps, could not be practically worked alone at a profit. It will be recol-

lected that in our case the plaintiffs were merely appointees, having a more economical mode of operating the road; they were not in any sense rivals, nor did they form a corporation. They were clearly entitled to enter into any contract not opposed to the policy of the law. The last cited case is, therefore, strong authority, inasmuch as a very similar contract authorizing another railroad corporation, not only to make connection with the railroad, but, if required, to do the whole and exclusive local business upon the latter road, was held valid.

Nor must this case be confounded with others, in which it has been held that any contract, whereby a railroad company engages to employ its funds in a manner not authorized by its charter, is void, upon application by one of its shareholders to restrain the execution of the contract. Cases of this kind form the bulk of those which will be cited by the other side, but there is no analogy whatever between them and the present case.

MacGregor *vs.* The Dover and Deal Railway and Cinque Ports, Thanet and Coast Junction Company, 18 Adolphus and Ellis, N. S., 618 (1852), and Colman *vs.* Eastern Counties Railway Company, 10 Beavan, 1 (1846), are examples of the class spoken of. In the first of these two cases the action was by the Dover and Deal Railway Company, &c., against MacGregor, the chairman of the South-eastern Railway Company, who had agreed on behalf of the latter company, that if the projectors of the Dover and Deal, &c., Railway Company would procure a certain act of Parliament, and if successful would hand over their scheme to the South-eastern Company, the latter, if the bill were rejected, would pay their parliamentary expenses. No clause in the Companies Act, under which the South-eastern Railway Company were organized, empowered them so to apply their

funds. The bill was rejected by Parliament. The court below gave judgment for the plaintiff, but the Court of Exchequer Chamber arrested the judgment on the ground that the promise by MacGregor was that the South-eastern Company should do an act which was illegal, and contravened public policy, and that no such action would lie against the chairman of the company upon such a promise. This decision was based upon that of the East Anglian Railways Company against the Eastern Counties Railway Company, 11 Com. Bench, 775, in which case it was held by JERVIS, C. J. (in the language of ALDERSON, B., who delivered the opinion of the court in the former case):—"That a railway company incorporated by act of Parliament is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever, and then the defendants having, *inter alia*, covenanted to pay the costs of soliciting bills then pending in Parliament, it was held that the act incorporating the defendants being a public act must be presumed to be known to the plaintiffs, and that they could not recover, inasmuch as the covenant entered into by the defendants was beyond the scope of their authority as a corporation, and was therefore illegal and void." In the case in 10 Beavan, the directors of a railway company had proposed to guarantee certain profits, &c., of an intended packet company which was to act in conjunction with the railway company, the directors being of opinion that such a connection would greatly inure to the profit of the railway company. Upon an application by one of the shareholders in the railway company to restrain the directors from executing the proposed agreement, an injunction was granted. The ground of the decision was the same as that in the two last cited cases. At page 17, Lord LANGDALE, M. R., used the following language:—"Is there anything in this act of

Parliament sanctioning such a course of proceeding? Do the powers to construct, maintain, regulate the traffic, and to do all that is necessary for the purpose of carrying on and working the railroad, imply that the directors are to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and add to the profit of the railway company? Surely there is nothing in the powers given by this act of Parliament which can authorize that. * * * * * * * *

"But I must say that, in my opinion, to pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation, is a thing which, according to the terms of this act of Parliament, they have not a right to do. At the same time, I am far from saying that there may not be many small things, perhaps small excesses of authority, which are obviously so beneficial, that the shareholders would all acquiesce in them, and never think of complaining of them. It does not, therefore, follow that they can not do the least thing not expressly mentioned in the act. *I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it.*"

With the principle laid down in this last case we cordially agree, but wherein is it applicable to the present case? It may be well enough to say that a railroad or other corporation has no right by its inherent powers to take the lease of a steamboat company or of another railroad company where it must guarantee a certain rent, or, in fact, enter into any enterprise however profitable, whereby the funds of a company are pledged to a purpose not connected with the object of their incorporation. That principle in no respect contravenes the rule sought to be established in the present case. If

the West Jersey Railroad Company, without legislative authority, had taken a formal lease of the Millville and Glassboro Railroad Company for a thousand years, a dissentient stockholder of the former company might well have said to the directors, "You are pledging the funds of this company to the support of another corporation, unconnected legally with the object of the incorporation of the West Jersey Railroad Company. You are pledging the funds of my company, which are to be solely devoted to the expenses of that company, and to paying me dividends, to purposes wholly foreign to either of these objects, and although it may result in my benefit, I have a right to compel you to withhold your hand from executing such an agreement, as it is wholly foreign to the articles of association between the shareholders, viz., the charter of incorporation, by which all are bound." No doubt a bill by a single stockholder would lie in such a case, if he had not been guilty of laches. But it is difficult to see how that can affect the present question, where not a dollar of the funds of the Millville and Glassboro Railroad Company was ever devoted to a purpose either foreign or collateral to the object of their incorporation, and where the agreement was made simply to obtain a cheaper set of servants than those employed before the arrangement was entered into. All the cases, therefore, cited upon the other side, wherein a bill filed by a stockholder of a railroad company to restrain the company from devoting its funds to some enterprise unconnected with the objects of the incorporation of the company, wherein relief has been granted, enjoining the execution of a proposed executory agreement, may be dismissed as wholly foreign to the present case. And this class includes all those cases where shareholders of one company have restrained their directors from taking a lease of another company, inasmuch as that would clearly be a diversion

of the funds of the first company. The converse of that proposition, in cases where the lessees are not a corporation, but individuals with full power to act, is a very different case.

We may remark that these cases of MacGregor *vs.* Railway Company, and East Anglian Railways Company *vs.* Eastern Counties Railway Company, *supra*, have been severely criticised, and are perhaps no longer authorities even in England. See the remarks of ERLE, J., in Mayor of Norwich *vs.* Norfolk Ry. Co., 4 Ellis & Blackburn, at 413, *post*, 36–9; of BLACKBURN, J., in Taylor *vs.* Ry. Co., L. R., 2 Ex. Ca., at 375, *post*, 40–4; and of Lord ST. LEONARDS, in Ry. Co. *vs.* Hawkes, 5 H. of L. Ca., 331, *post*, 39, 48–9.

But, on principle, why should the argument of *ultra vires* be maintainable in a case like the present, where the funds of the corporation have not been engaged outside of the scope of the object of their charter, and where the only objection that can be made is that the corporation has handed over some of its administrative duties to others than the corporators themselves, especially where the supervision of the directors of the corporation is maintained and the rights of the shareholders otherwise secured? In the case of Robbins *vs.* Embry, 1 Sm. and Mar., Ch. R. (Miss.), at page 268–9 (1843), the question is well answered by the Chancellor of the State of Mississippi. There a banking corporation, authorized by charter to build and operate a railroad, made an assignment for the benefit of creditors, conveying to the assignees the power of managing and controlling the railroad until certain debts should be paid out of the profits of the road. The objection was made that the conveyance was invalid, because this was a delegation to strangers for a term of years of discretionary powers granted exclusively to the corporation. The court held that the provision was valid, and that the assignment was not affected by it.

"It is said that the management of the road is an act of corporate power which can only be exercised by the corporation itself, and can not be delegated to others. To this it may be replied that a corporation can only act through the intervention of agents; the corporation itself is a mere theoretical or ideal person, having neither volition or action, and I apprehend that it may be laid down as a general rule, that a corporation may appoint any one for the doing of any act, the performance of which is not expressly or necessarily limited by the terms of the charter to the directors or other officers of the institution [citing authorities]. Here the corporation could not assign the railroad itself, because that is a mere franchise, and is not in its nature assignable. The profit of the road was the only thing in connection with it which could be assigned, or which was actually assigned. *There was, therefore, an obvious propriety in giving to the assignees, temporarily, the control of the road, with a view to its completion, and the receipt and application of its profits to the payment of debts. In the management of the road they were mere agents of the corporation*, and I do not see how the leading objects of the assignment could have been accomplished in any other form."

The Chancellor further said that the question whether the corporation had exceeded its powers *could not be inquired into either in this form or at the instance of the present* defendants, citing Silver Lake Bank *vs.* North, 4 Johns. Ch. R., 370.

Llanelly Railway Company and Dock Company *vs.* The London and North-western Railway Company, 8 Chancery Appeals, 943 (1873), may be cited as a somewhat similar case to the present, in which the very eminent counsel who argued for the plaintiffs, one of whom, Mr. Cotton, has since become a Lord Justice, did not think it worth while to take the objection of *ultra vires.*

There the plaintiff company applied to the defendant company for a loan of £40,000, which loan was made in consideration of an agreement that the North-western Company, defendants, should have running powers over the plaintiff company's line. The agreement provided that, subject to such by-laws and regulations as the plaintiff company should make, the defendant company might run over and use the railways of the plaintiff company, and their stations, sidings, and conveniences, and that the defendant company might have their own staff at the stations of the plaintiff company; that the defendant company should fix the rates, subject to arbitration, for the exercise of the running powers, *and should, if required by the plaintiff company, carry the plaintiffs' local passengers for fifteen per cent. of the local fares.* Held, that the agreement was a proper one in consideration of the loan, although made for all time at the defendant company's option.

Certainly in this court the mere fact that an instrument provides that the railroad should be run, not directly by the corporation, but by agents chosen by it, has never been held to make such an agreement invalid. As late as 1870 this question was presented in the case of The Galveston Railroad *vs.* Cowdrey, 11 Wallace, 459. Mr. Justice BRADLEY (at 474) states the argument as follows: "But the defendants contend that if the power to mortgage mere real and personal estate be conceded, still there is no power to mortgage, *or in any to assign the railway as such, or the franchises of operating it and taking toll, or any other franchises, much less that of exercising corporate powers;* and hence the decree is erroneous in authorizing a sale of these rights and franchises under the mortgage.

"Without examining how far the operative effect of a mortgage executed by a railroad company upon its road,

works, and franchises may extend *per se* without statutory aid, it is sufficient to say that, in our opinion, the Legislature of Texas has validated the mortgages, and given them the effect which by their terms they were intended to have."

The defendants also argue that the contract here was invalid, inasmuch as it provided that the plaintiffs, the agents of the corporation, were to be liable to the public in the place of the corporation itself, and that the corporation could not divest itself towards the public of the duties imposed on it by its charter.

To the last branch of this proposition every one must agree; but the mere fact that a clause has been inserted in the agreement, whereby the parties contract between themselves that the agents shall be primarily liable to the public, and shall indemnify the corporation, in no sense invalidates the agreement. This objection has been made and treated as without force in many cases. In Langley *vs.* Boston and Maine Railroad, 10 Gray, 103, it was held that a railroad corporation of Massachusetts was not exempted from liability for the loss of goods delivered to it to be carried over part of its line to the State line, by having previously leased that part of its road to a corporation established by law in an adjoining State, whose road connected with it at the State line. In York and Maryland Line Railroad Company *vs.* Winans, 17 Howard, 30, this court held that a Pennsylvania railroad corporation could not, by transferring its rights and powers to a company in another State, evade the duties imposed upon it by its charter. In the latter case it was held that the railroad company was responsible for the infraction of a patent right respecting cars, although the entire capital stock of the company was held by a railroad company in Maryland, which worked the road by its agents and rolling stock.

In Bissell *vs.* The Michigan and Northern Indiana Railroad Company, 22 New York, 258, the same doctrine was held.

II. The contract was authorized, inasmuch as it was neither directly nor impliedly forbidden; was germane to the object of incorporation—and would have been valid at common law, if made by a corporation created by charter.

We conceive the true rule, both upon principle and upon authority, to be this:—

A corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter.

At the common law, when a corporation was duly created, *all incidents* were *tacitè* annexed to it, and a limitation upon their power of alienation was not binding in law.

Thus in the case of Sutton's Hospital (10 Coke, 30, b), it was resolved: "3. That when a corporation is duly created, all other incidents are *tacitè* annexed to it. * * That a corporation is sufficient without words, to implead, or be impleaded, etc., and therefore divers clauses subsequent in the charter, are not of necessity, but only declaratory, and might well have been left out, as, 1; by the same, to have authority, and capacity to purchase, etc., *but no clause is added that they may alien*,

etc., and it needeth not, for it is incident; 2. to sue and be sued, implead and be impleaded; 3. to have a seal, etc., that is also declaratory, for when they are incorporated they may make or use what seal they will; 4. *to restrain them to alien or demise but in certain form, that is an ordinance testifying the King's desire, but it is but a precept which doth not bind in law.*"

The same principle as applicable to modern corporations is thus expressed in Angell & Ames on Corporations, section 191: "A corporation authorized to dispose of its property may in general dispose of any interest in the same it may deem expedient, *having the same power in this respect as an individual.* Thus it may *lease*, grant in fee, in tail, or for term of life, mortgage, and, though insolvent, *assign its property in trust* for the payment of its *debts.* * * * "

A corporation, whether created at the common law or by statute, has, therefore, an inherent power to do all such acts as a natural person may do (and here the act of incorporation expressly declared (34), section 1, that the Millville Company "*shall be capable* of purchasing, holding, *and conveying* any lands, &c., whatsoever, necessary or expedient for the object of this incorporation"); but the prohibition of the law-making power, either express or implied, makes the enforcement of any prohibited contract void, as being against public policy. But the controversy may be not only between the corporation, as such, and a stranger; but between the shareholders of the corporation, or between one or more shareholders and the corporation itself. In this event the charter is to be looked at in a very different light. It is not only the grant of powers from the public, but, in a more limited sense, the articles of copartnership of the shareholders. Obviously, any shareholder may restrain his associates from entering upon acts of any kind be-

yond the authority granted in the original agreement. I may prevent my fellow-partners, whether co-members with me of a corporation or not, from exceeding the authority I have given them to bind me; but this is not from an inherent incapacity in them as a body to do the act, but because they have no authority from me to bind me to do that act. If, then, I directly authorize my partners, or their governing body, *i. e.*, the directors of a corporation, to do an act unauthorized by the articles, or if I afterwards ratify the unauthorized act by acquiescence with knowledge or by active participation, I am debarred from asking to be restored to my original position, or from pleading the original want of authority in my agents, when I am sought to be held responsible for their ratified acts. Nor am I aided by the fact that I am the shareholder of a corporation instead of an ordinary partner, unless the act which I have ratified is prohibited and still partly unexecuted. This is apparent, because inherently the corporation has power to do the same acts as an individual.

The question, then, in cases where no authority is given to execute the contract, or do the act contemplated, is this:—

"*Has the charter prohibited the contract sought to be enforced; if it has, has the prohibited portion been completely executed; if it has not, have the partners, the shareholders in the corporation, ratified the act which their agents, the directors, were, as against them, unauthorized to perform?*"

Let us see how the authorities stand upon these propositions.

The law has been admirably stated by BLACKBURN, J., now Lord BLACKBURN, in the case of Taylor *vs.* The Chichester and Midhurst Railway Company, L. R., 2 Ex. Ca. at 375 (1867), and by ERLE, J., in The Mayor of Norwich *vs.* Norfolk Railway Company, 4 Ellis and

Blackburn, 413 (1855). In the latter case an action was brought against a railway company on a covenant under seal, that unless certain works were completed within twelve months the company should pay £1000 as liquidated damages. The plea set up the deed, whereby it appeared that the defendants, the railroad company, had made a pier, intending to make a bridge to carry the railway across a river at a point not permitted by their act of incorporation; that, in consequence of legal proceedings taken against them on account of such erection, they had executed the deed in question, covenanting to endeavor to obtain an act legalizing the construction of the bridge and pier, and further covenanting that whether the act was obtained or not they should pay to the plaintiffs £1000 as liquidated damages; averment that the works were not authorized by any act of Parliament. The court was equally divided as to the validity of the plea. ERLE, J., at page 413, thus states his opinion:—

"It is in this part of the judgment that precision seems to be wanted (*i. e.* in the case of the East Anglian Railways against the Eastern Counties Railway Company, &c., *supra*). It does not appear who could make the concession respecting trading, which the court could assume to be law, nor how the law respecting trading, if it exists, is to be applied in practice. Is every contract of buying or selling, which the court does not know to be for the purpose of the railway, to be taken in law to be a prohibited contract? Or must the contract in question be found in fact to be made in the course of a trading, unconnected with the purpose of incorporation? And, if it is found to be so, is it void unless both parties knew it to be so? So with respect to applying the funds only to purposes expressly sanctioned by the act. Must the funds be applied directly and immediately to a purpose expressly sanctioned by the act, that is, to the making, maintaining, or working a railway? Or may

they be applied in procuring means which may be ultimately applied to such purposes? Must they purchase the article to be used, such as the rail or the engine? Or may they purchase the raw materials in order to make the article to be used?

"Looking at the report, with the remarks in the argument, I understand the court to have meant that any application of the funds, and any contract, which in the knowledge of the party who should sue upon the contract was intended for a purpose unconnected with the purpose of incorporation, was prohibited; and that, where the contract itself appeared to be necessarily unconnected with the purpose of incorporation, both the parties must have known it to be so, and the court could judicially perceive it to be void; and that, if the contract was not necessarily unconnected, the ground of illegality must be averred and found in the usual way, before it could be a ground of judgment; and that *no application of the funds, and no contract, was prohibited by implication, which the parties intended to be connected with the purpose of incorporation, however distant the connection might be.* The question put in the course of the argument, would a contract by a railway company for a theatre or a chapel be void, exemplifies the doctrine. It would or it would not, according as the purpose of the contracting parties was or was not connected with the railway. * * *

"The legality of this doctrine of an implied prohibition can be properly discussed only in a court of error: It brings with it serious evil, both in affecting with uncertainty contracts with railway companies, and also in reversing the usual application of the law of contracts, in as far as it justifies instead of redressing breaches of contract."

An interesting review is then made of the following cases, which are among those relied upon for the defendants. MacGregor *vs.* Dover and Deal Railway, &c.,

Company, *supra;* Gage *vs.* New Market Railway Company, 18 Q. B., 457; South Yorkshire Railway and River Dun Company *vs.* The Northern Railway Company, 9 Exchequer, 55; Great Northern Railway Company *vs.* South Yorkshire Railway Company and River Dun Company, 9 Exchequer, 642; Simpson *vs.* Dennison, 10 Hare, 51. "These suits in equity between different members of the company, bear no analogy to actions at law, by third persons against the corporation, either in respect of the parties to the suit, or the subject in litigation. As to the parties in actions against corporations, the members thereof in their individual capacity are strangers to the suit; *and the rights of persons who contract with corporations are unaffected by the rights of members inter se:* see the judgment of Lord COTTENHAM in Edwards *vs.* The Grand Junction Railway Company, Myl. and C., 650, and of Lord ST. LEONARDS in Hawkes *vs.* The Eastern Counties Railway Company, and of PARKE, B., in South Yorkshire Railway and River Dun Company *vs.* Great Northern Railway Company, 9 Exch., 55.

"In respect also of the subject-matter of the suit, the question in equity is, whether the interest of the shareholder is put into hazard to an unreasonable degree, beyond what he is presumed to have assented to in subscribing; and, if so, his interest is protected according to equity. *At law the question is whether a contract is in a class that is impliedly prohibited, and so void;* if it is, whoever is defendant is entitled to unqualified success, and the judgment must be in his favor, though he may have knowingly procured the unlawful contract, and have profited by it to the extent of receiving the consideration for the promise which he alleges to be void, or though he may have damaged the plaintiff by his negligence in the performance of that which the plaintiff supposed to be a lawful contract, but which, after judg-

ment for the defendant, he must be taken in law to have known to be unlawful.

"The case of MacGregor *vs.* The Dover and Deal Railway Company, *supra*, shows that the question at law is whether the contract was prohibited, not whether it was made in excess of the authority given to the directors.

* * * *

"The expression that the contracts which are held null within the doctrine in question, are void because they are *ultra vires*, seems to imply that the courts of law, in an action against a corporation upon a contract duly made and valid in form, compare the contents of the contract with the powers supposed to be given to the directors by the shareholders, either in the capacity of agents for them, or by the statute, and hold it void, if there is an excess beyond those supposed powers. *This is the jurisdiction exercised by the courts of equity above described; but the courts of law have no such jurisdiction.* See the judgment of PARKE, B., in South Yorkshire Railway and River Dun Company *vs.* The Great Northern Railway Company, *supra*." The learned judge, together with COLERIDGE, J., held that the plaintiffs could recover. The case was not appealed, although the defendants applied for a judgment so that the writ of error might be taken, and Lord ST. LEONARDS afterwards approved of the principle thus laid down. In Ry. Co. *vs.* Hawkes, 5 H. of L. Ca., at 371, he says: "But although there the contract depended upon works to be executed which were not authorized by the act of Parliament, yet two of the learned judges, Mr. Justice COLERIDGE and Mr. Justice ERLE, were of opinion that, looking at the nature and cause of the deviations, it was not *ultra vires, and their opinion was supported by elaborate arguments, in the general scope of which I am very much inclined to concur.*"

In Taylor *vs.* The Railway Company, *supra*, BLACKBURN, J., at 362, during the argument said * * * "The opinion of PARKE, B., in South Yorkshire Railway Company *vs.* Great Northern Railway Company, *supra*, is at variance with the opinion of JERVIS, C. J., in East Anglian Railways Company *vs.* The Eastern Counties Railway Company, and assumes that corporations so created have power to do all acts which they are not expressly or by clear implication prohibited from doing. And this opinion is supported by ERLE, J., given in Mayor of Norwich *vs.* The Norfolk Railway Company, *supra*, and Bostock *vs.* North Staffordshire Railway Company, 4 Ellis and Blackburn, 813. The question is whether a breach of the statutory directions as to the destination of the funds is merely a breach of trust to be restrained by a shareholder, or altogether an illegal act." And in giving his judgment (at page 378), his Lordship pointed out the distinction already adverted to between a bill filed by a dissenting stockholder to enjoin a scheme which without his consent is invalid as not being clearly within the express powers of the corporation, and an action like the present against a railroad company where on a contract assented to by them till at the trial of the action, they raise the plea of *ultra vires*. "But the shareholder may waive any right which is given to him for his own protection only: And if he has either expressly or tacitly done so, he can no longer object; and neither a stranger nor the body corporate itself, can raise such an objection to a contract made by the corporation, if no shareholders choose to raise it for themselves.

"But the legislature, with a view to public policy, does, sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated, and when an act is thus made *malum prohibitum*, any contract to do it is illegal; and if there is

an attempt made to enforce such a contract, the defendant, whether a company or an individual, may, if his conscience permit him, set up the illegality to which he was a party; for *in pari delicto potior est conditio defendentis.* Though every shareholder in the company had assented to the making of a particular contract, yet if the legislature have, not merely for the protection of the shareholders, but for the good of the public, forbidden the making of it, it is illegal, and the corporation whose shareholders have all assented is in no worse position for raising the defense than the chairman of the company who has personally entered into the contract, and yet may, as was decided in MacGregor *vs.* Dover and Deal Railway Company, *supra*, set up the provisions of the railway acts as making his personal contract illegal.

* * * * * * * * * *

"I think it very unfortunate that the same phrase of *ultra vires*, has been used to express both an excess of authority, as against the shareholders, and the doing of an act illegal as being *malum prohibitum*—for the two things are substantially different; and I think the use of the same phrase for both has produced confusion. When the objection to a particular contract is that it may affect the interest of the shareholders, the objection can be raised by them in a court of equity, as is very clearly pointed out by Vice-Chancellor Wood in Maunsell *vs.* Midland Great Western of Ireland Railway Company, 32 Law Journal (Ch.), at 515.

"I think that any objection made only on the ground that it affects the interests of a shareholder, can only be made by or on behalf of the shareholders, and therefore can not be made in a court of law at all, but must, if raised at all, be in a court of equity. * * * * The seemingly technical point raises the question whether the smallest excess of authority renders the whole contract illegal, and so entitles

those who have the management of the corporation (and who, therefore, presumably were as individuals consenting parties to the contract) to repudiate the contract in the name of the company, however long it has been acquiesced in, and however seriously the position of the plaintiff has been altered in consequence of that acquiescence; or whether the objection should be held to lie only in the mouth of those shareholders, who were not consenting parties to the contract sought to be set aside, or have not by laches, or otherwise, rendered it inequitable in them to set it aside. It is obvious that *an adherence to this distinction will prevent those scandalous cases which have rendered the word repudiation a term of opprobrium.*"

His Lordship then stated, that it was contended by the defendants that the legislature had from public policy forbidden the railway companies to make any application of their funds which a dissentient shareholder could stop, and so had rendered the contract *malum prohibitum*; that, therefore, any contract to perform any act involving such expenditure was illegal and forbidden, and said that he did not agree to either position. The cases of The East Anglian Railways Company *vs.* The Eastern Counties Railway Company, *supra*, MacGregor *vs.* Dover and Deal Railway Company, *supra*, and Eastern Counties Railway Company *vs.* Hawkes, *supra*, were referred to. His Lordship stated, that they were bound as a court of law to hold, not merely that a contract to do an act forbidden by a public statute, as contrary to public policy, was illegal and void, but also, that the provisions relating to the appropriation of the capital to the purpose of the statutes authorizing it to be raised, were not merely for the benefit of the shareholders, which, therefore, they might waive, but for the public benefit, making an appropriation of the funds to other purposes, such as those in the contract, before the Court of Exchequer Chamber, *malum prohibitum.*

"ERLE, J., in Mayor of Norwich *vs.* Norfolk Railway Company, *supra*, impugns this decision (viz., that of MacGregor *vs.* Dover and Deal Railway Company) with great force of reasoning; and if I were now advising the House of Lords, I should wish to reconsider the point. * * * But I do not think that the position to be inferred from the language of the judgment in The East Anglian Railways Company *vs.* The Eastern Counties Railway Company, *supra*, that every appropriation of the funds that is not so far authorized by the statutes as to be binding on a dissenting minority of shareholders, is therefore forbidden and illegal, is at all part of the decision of the court of error so as to be binding on us. *I think, moreover, it is wrong, and that, if it were part of the decision, it has been departed from in subsequent cases.*" His Lordship then referred to the case of The South Yorkshire Railway Company *vs.* The Great Northern Railway Company, wherein Baron PARKE says: "Generally speaking, all corporations are bound by a covenant under their corporate seal properly affixed, which is the legal mode of expressing the will of the entire body, *and are bound as much as an individual is by his own deed.* Contracts with partnerships stand upon a different footing. * * * But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by contract in which all concurred. But where a corporation is created by an act of Parliament for particular purposes with special powers, then, indeed, another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires;* that is,

that the legislature meant that such a deed should not be made." * * * * * *

"Lord Wensleydale's mode of stating the proposition has been adopted as expressing the true doctrine, by the Court of Queen's Bench, in Chambers *vs.* Manchester and Milford Railway Company, 5 B. & S., 588; by the Court of Common Pleas, in South Wales Railway Company *vs.* Redmond, 10 Q. B., N.S., 675; by the Court of Exchequer in Bateman *vs.* Mayor, &c., of Ashton-under-Lyne, 3 H. & N., 323; by Lord CRANWORTH, C., in delivering the judgment in the House of Lords, in Shrewsbury and Birmingham Railway Company *vs.* The North-western Railway Company, 6 H. of L., 131, 136; and I think, therefore, *we are entitled to consider the question to be, not whether the present defendants had by virtue of their acts of incorporation authority to make the contract but, whether they are by those statutes forbidden to make it.* And I think that the cases subsequent to that of The East Anglian Railways Company *vs.* The Eastern Counties Railway Company, and more particularly that of The Eastern Railway Company *vs.* Hawkes, 5 H. of L. Ca. 333, show that the present contract (assuming it to be really what it purports to be) is not forbidden, and consequently is legal as against the corporation, though a shareholder (if there be one) who did not acquiesce in the promotion of this bill and the making of such contract by the directors, may, perhaps, have a right in equity to have the contract canceled."

It is true that the judgment of BLACKBURN, J., was the judgment of the minority of the court (four of the judges of the Court of Exchequer Chamber being of opinion that the contract was *ultra vires*, two of them, WILLES and BLACKBURN, JJ., that the contract was not *ultra vires*, and that the company was bound). The judgment of the Court of Exchequer had been in favor of the plaintiff; that judgment was reversed by

the majority of the Court of Exchequer Chamber in the case cited, but the decision of the Exchequer Chamber was itself reversed and judgment ordered to be entered for the plaintiff in the original action, by the House of Lords (see L. R., 4 English and Irish Appeal Cases, 628; Lords HATHERLEY, WESTBURY, and COLONSAY). The opinion of BLACKBURN, J., is therefore an authoritative and recent exposition of the law, the case having been decided in the House of Lords in 1870.

In The South Wales Railway Company *vs.* Redmond, 10 Com. Bench, New Series, 675, 686 ( ), a contract had been made, whereby the defendant agreed to run a steam vessel in connection with the trains of the railway company, plaintiff. The defendant pleaded *ultra vires*, but judgment was given for the plaintiff, ERLE, C. J., saying that the contract had in no case been held to be illegal, excepting where "the object to be effected was something wholly unconnected with the purposes of the incorporation."

WILLIAMS, J., held that the contract "was directly connected with the working of the railway, and the objects of its extension, and therefore not *ultra vires*." (See Bateman *vs.* Mayor, &c., 3 H. & N. 323; 1858.)

Now here the execution of the contract alleged to be *ultra vires*, was *directed* by the shareholders. It was made after the fullest consideration, and with the knowledge and approval, so far as we are aware, of every shareholder of the Millville Company. There was no attempt by the directors to bind the shareholders to an unlawful or doubtful act, by which any shareholder might consider himself not bound, unless he has ratified it. On the contrary, the shareholders *order* the directors to make the contract. The agreement (29) recites (by which recital, under seal, the parties and the defendants, who are privies of the Millville Company, a party to the agreement, are bound)—

"WHEREAS, At a meeting of the stockholders of the Millville and Glassboro Railroad Company, held at Millville the fourteenth day of July, A. D. 1863, it was proposed to lease the railroad, and it was then judged best to refer the same to the next meeting of the board of directors, with power to act; and at the next meeting of that board, held on the same day and at the same place, the following resolution was offered, to wit:

"*Resolved*, That Thomas H. Whitney, Ferdinand F. Sharp, and Richard D. Wood, be appointed as an executive committee to conduct the general business of this company, and that they be empowered to lease the road in perpetuity or for one or more years, as they may deem best for the interest of the concern, taking proper care to contract with responsible lessees."

"On motion, it was resolved to amend the above resolution, so that any contract made by the therein-named executive committee should be submitted to the directors, and be by them approved before said contract should be binding upon this company.

"On motion, the above resolution as amended, was adopted.

"AND WHEREAS, In pursuance of this authority, and of all other authority them in that behalf enabling, the party of the first part is desirous to contract for the transportation of freight, mails, and passengers over, &c."

The contract was, therefore, made not only by the board of directors, after discussion, but literally, by the corporation itself, the shareholders having assembled to discuss the subject, and having, as shareholders, directed the contract to be executed through their agents, the board of directors. Here the directors were merely the hand by which the act was performed. The case differs, therefore, from all of those in which the question

of excess of authority by officers of a corporation as against the members thereof is raised. Not only was no dissent apparent, but the action was at no time questioned by a single shareholder or officer of the company, even after the contract was terminated; nor was it until the trial of this case that the point was ever heard of, after the contract had been treated as valid for years, large sums paid under it by the plaintiffs, and dividends paid thereout to the shareholders, and every act done by either party had been a complete recognition and approval of the original contract.

It will be observed that this is not like an ordinary breach of contract. The plaintiffs have performed their part of the agreement in full. Not a single act of any kind remains to be performed by them under the contract. The alleged unauthorized acts have been wholly performed and concluded, and nought remains for the defendants but to pay for what they have received. Nor is the contract divisible and the covenants severable.

The possession of the road for any one year is in no sense the *full* consideration for the performance of the plaintiffs' covenants for that year. It is on the express condition that the contract is to last for twenty years, or (what is equivalent to that) that the remainder of the term is to be valued and paid for by the defendants that the contract is agreed upon. The profits are expected to increase towards the end of the term by the admirable management of the plaintiffs, and by their successful attempt to build up the business of the road. They would never have entered into a contract with so many unfavorable terms, but for their expectation of realizing very handsome profits in the last years of its continuance.

The cases illustrative of the principle where the illegal act has been performed are stated *post*, at pages

To such a case as this, the language used by Lord ST. LEONARDS in The Eastern Counties Railway Co. *vs*

Hawkes, 5 H. of L. C., 331 (1855), is applicable. There it was argued for the appellants that their contract with the plaintiff was *ultra vires*. Lord ST. LEONARDS said (at pages 369-70; 372-3; 380-1), "Under this head the general question of the power of such companies to bind themselves was argued. Now, this is a question between the appellants (the railway company), bound by their contract under seal, and the party with whom they contracted. It is not a question between them and their shareholders, but, as was observed in Edwards *vs.* the Grand Junction Railway Company, 1 Myl. & Cr., 674, 'the court can not recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself.' The covenant of the company is binding on the face of it, and the appellants must show, if they can, why it should not be so." He then argues that the contract was impliedly within their power. "The safety of men in their daily contracts, requires that this doctrine of *ultra vires* should be confined within narrow bounds." * * * * * These opinions seem to me fully to support the decree now complained of. The appellants, as a corporation, have all the powers incident to a corporation, except so far as they are restrained by their act of incorporation. Directors can not act in opposition to the purpose for which their company was incorporated, but short of that, they may bind the body just as corporations in general may do. The opinions of some of the judges in the Norwich Case favor the disposition which I feel to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation and of the contract entered into. * * * * Upon the whole, I am clearly of opinion that the decree was right, and ought to be affirmed with costs. I trust that this decision, and the decisions of this house, during the present session,

in the cases of the National Exchange Company *vs.* Drew, 2 Macq., 103, and in Bargate *vs.* Shortridge, *ante*, 297, will place the powers and liabilities of directors and their companies in making contracts, and in dealing with third parties, upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established; but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which can not clearly be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors, with third persons, in relation to their shares, although that mode of dealing is contrary to the regulations of their deed of management. I hope that we shall have no other cases before us where the defense of a company rests upon the want of power to make a contract, which the directors deliberately entered into, and under which they took a benefit, or upon the irregularities of their own proceedings."

III. The defence of *ultra vires* is inadmissible to an action against a corporation upon its contract duly made, where (if not wholly executed) all of the shareholders have acquiesced in its performance, or where the contract has been wholly performed by the other party without objection on the part of the corporation, or any of the shareholders.

1. Even in those cases, many of which have been cited in the former part of this argument, where the

shareholder would have been entitled to relief against the execution or continuance of an unauthorized contract, that remedy has been refused him on the ground that his application comes too late, his laches having lost him a right originally possessed. We do not contend that any majority, however large, can bind a single dissenting shareholder where the act proposed to be done is not within the powers of the corporation; but we contend that even a dissenting shareholder must ask for the relief which he is entitled to in time, or be otherwise debarred.

The principle is well stated by Lord HATHERLEY (then Vice-Chancellor Sir W. PAGE WOOD) in Hare *vs.* Ry. Co., 2 Johnson & Hemming, 80, 121 (1861). In that case the plaintiff filed a bill to set aside an agreement between two groups of railway companies to divide the profits of the whole traffic in fixed proportions. The plaintiff, as shareholder in one of the companies, had, with full knowledge, received his profits as shareholder under the agreement; he then purchased a share in the other company, and filed his bill against the latter.

"With respect to the point of acquiesence, I agree with the argument of Sir H. Cairns, that the reported cases on the subject of acquiescence are of a different description from this. Where an act is done once for all—as the irregular expenditure of money, for example —this defense rests on a different basis. Graham *vs.* Birkenhead Railroad Company, 2 Mac. & G., 146, is the only case which, from this point of view, bears at all upon the present. There something did remain to be done to carry out the transaction, but still a counter-equity existed. Here it is not a question of acquiescence in an act which has been completed, but whether a plaintiff, after accepting money in the shape of increased dividends under an agreement, which is much more than a mere submission to the will of the majority of the share-

holders, can turn round and take the opposite view, and ask that the agreement may be set aside. *This consideration would have made me pause before granting the prayer of the bill, even if I had more doubt than I have as to the legality of the contract.* Upon the question of legality, however, without the aid of other considerations, I must dismiss the bill with costs."

Our case is *a fortiori* to the one cited. In the latter, the mere fact of the reception of dividends by a stockholder, with knowledge, was enough to make the Chancellor pause before restraining *for the future* an agreement which was a continuing one; while in our case every shareholder not only continuously ratified the contract until its complete termination, but in the beginning actually authorized and ordered their directors to enter into the contract in question after the subject had been pointedly brought before them. During the whole of this period large dividends were paid to the shareholders, and no criticism upon the execution of the contract or the conduct of the defendants thereunder was ever officially expressed until the notice by the corporation that the lease was to terminate on the 1st of April, 1868. Now, how can the corporation, which is but the aggregate of the individual stockholders, possess rights, either as plaintiff or defendant, greater than the sum total of the rights possessed by the whole of the stockholders who formed it? How can the corporation defendant be entitled to a defense which all of the shareholders combined could not make use of? If the whole body of shareholders could not have restrained the continuation of the lease except by putting an end to it according to one of its clauses, how can the corporation do so? The latter must, therefore, be debarred from interposing the plea of *ultra vires* where the corporation's equivalent,—the aggregate of all the stockholders,—is estopped by acquiescence. The same principle is stated in the later

case of Phosphate of Lime Co. against Green, L. R., 7 Com. Pl. Ca., 43, 62, 63 (1871). This was a common law action by the company against the defendant Green, the ground of action being that the company had canceled four hundred shares belonging to the defendant, an act alleged to be *ultra vires*, as being distinctly forbidden by the articles of association. BRETT, J., held that the act was *ultra vires*, being expressly forbidden by one of the articles, and stated that the only question was whether the act of the directors in canceling these shares had been ratified by the company.

"Now, in order to establish a case of ratification, it seems to me that it was not necessary to prove absolute knowledge on the part of every shareholder. As is pointed out by Lord ST. LEONARDS, in Spackman *vs.* Evans, L. R., 3 H. L. C., at 222, it was not necessary to show that every shareholder had actual notice. 'It is said,' he observes, 'that the absent shareholders in this case are not bound by the arrangement, unless the appellant can prove that every one of them knew the exact nature of the transaction. How can he prove this at the close of so many years? In Brotherhood's Case, 31 Beav., 365, it was held that they had notice—not that in point of fact such notice was proved.' It is impossible to prove that every shareholder had notice, or such a knowledge of the facts as amounts to notice. It is sufficient to show that facts were made known to the shareholders into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction. I think there was such evidence here * * *";

Now if a plea of accord and satisfaction can be maintained to a declaration, in a suit brought by a corporation to set aside an act clearly *ultra vires* of the corporation, upon evidence tending to show the acquiescence of the stockholders, the evidence amounting simply to this,—

that facts were at a general meeting brought before the shareholders which should have put them upon inquiry—it is decisive of the present question. If no such common law action can be maintained upon such a state of facts, how can the transaction be virtually set aside after its termination, where there have been continuous knowledge and assent of shareholders, officers, and corporation during the whole period of its existence?

To the same effect are the authorities in this country, of which it is sufficient to cite a single one. In The Erie Railway Company *vs.* Delaware, Lackawanna and Western, and The Morris and Essex Railroad Company, 6 C. E. Green's Chan., 21 N. J. Reports, 283, 289 (1871), the complainants filed a bill to restrain the defendants from making a certain connection, alleging, among other things, that the branch road, which the defendants proposed to operate in connection with their main road, had been built without any authority from the legislature, as to which the defendants were therefore mere trespassers.

"My reason," said Chief Justice BEASLEY, "for thus postponing all ultimate consideration of the legal status of this branch road of the defendants is because, on the concession even of its unlawfulness, I do not think the complainants are in a position to challenge such status before this court. In my opinion the complainants have lost their right by their own acquiescence and laches. * * * * I know of no principle of equity better settled than the rule applicable to this matter, nor does it seem possible for any facts to be more obviously within the reach of such principles. The case is this: The complainants claim the exclusive right to a railroad between the cities of Patterson and Hoboken. They stood by and saw the defendants build, within sight of their own road, a rival parallel road this whole distance, at a cost of many millions of dollars. They expressed no dissent

and gave no warning, and finally they sold for a large sum of money a part of their own land to help the construction of this road, which, it is now claimed, has no rightful basis whatever. In my estimation these facts are amply sufficient to debar the complainants from ever calling in question the lawfulness of this structure, which has been erected, not only through the passiveness of the complainants, but by their active assistance. * * * * * If the complainants intended to contest the right of the defendants, why was not prompt action taken before this enormous outlay was made? Fair dealing and good conscience obviously required the complainants to assert their right at the outset if it was designed ever to do so."

The view taken by the Chief Justice in the case just cited was affirmed by him in the subsequent case of the Delaware, Lackawanna and Western R. Co. *vs.* Erie R. Co., Id., 301.

If, then, a shareholder, or the corporation itself, is estopped by long acquiescence from asking relief in equity, although the act complained of is unauthorized and illegal as against the community, in what better position are they when to a suit in common law upon a completed undertaking the plea is entered that they had no permission to undertake to do what they have actually completed?

2. *But where the transaction is complete and nothing remains to be done by the party seeking relief, the plea of* ultra vires *is not available by the defendant corporation in an action brought against it for not performing their side of the contract.*

The earliest case in this country upon this subject seems to be that of The Silver Lake Bank *vs.* North, 4 Johnson Chan. R., 370, 373 (1820).

This was substantially a bill of foreclosure brought by the Silver Lake Bank, a Pennsylvania corporation, praying that certain land in New York, mortgaged to it, might be sold, &c.

"Another objection," said Chancellor KENT, "is that the plaintiffs had no right to take the mortgage concurrently with the loan in order to secure it, and that the charter only authorized them to take mortgages for 'debts previously contracted.'

"*If this objection was strictly true in point of fact, I should not readily be disposed to listen to it. Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments, and if they should pass the exact line of their power, it would rather belong to the Government of Pennsylvania to exact a forfeiture of their charter, than for this Court in this collateral way to decide a question of misuser, by setting aside a just and bona fide contract.*"

In Steamboat Company *vs.* McCutcheon & Collins, 13 Penn. St. R., 13 (1850), an action was brought against the corporation for the use and occupation of an office.

COULTER, J. said: * * * * "No corporation can hold real estate beyond the authority conferred in its charter, and the extent of that authority in this case is not in evidence. But every corporation may contract; and having purchased and paid for real estate, the vendor can not take it back at his pleasure, nor make the contract null and void as to him. The State, by virtue of its transcendent power, may escheat it. But this principle does not extend to a lease, or to a contract, express or implied for the purpose of enabling a corporation to carry on its business."

The judge then stated the question to be whether the contract made by the president was within the scope of its authority.

"The president of a company presents himself to make a contract evidently connected with the business

He declares the object and purpose of the contract. Who doubts him? We are a dealing people. Is he asked to produce the charter and the books of the company to show that he is authorized to make the contract *secundum artem?*

The Oneida Bank *vs.* The Ontario Bank, 21 New York Reports, 490, 495 (1860). * * * * In this case it was held that, assuming a draft, issued by a banking association, and taking effect by delivery, but post dated, to be within the prohibition of a statute of the State of New York, against bills or notes not payable on demand, the party who had taken it upon a loan to the bank was entitled to recover the loan.

COMSTOCK, C. J., expresses the opinion that the effect of prohibition, by the legislature, of a security of the kind in question, coupled with an enactment of fine or imprisonment, against any member of the association violating the section, did not make the contract void in the hands of a *bona fide* holder.

"There is no doubt a principle of the common law, that illegal and prohibited contracts are void, without being so expressly declared by any statute. But there is also another principle, equally well ascertained, and more beneficent in its results, that no party shall set up its own illegality or wrong to the prejudice of an innocent person. He can set it up when the legislative power not only forbids to make the contract, but declares it to be void. But the logic of the law, and certainly its morality, are not opposed to the doctrine that the legislature may prohibit the contract and punish the guilty parties, and yet leave the contract to stand in favor of innocent persons not included in the terms of prohibition."

In Bissell *vs.* The Michigan Southern and Northern Indiana Railroad Companies, 22 New York, 258, 272–3 (1860), two companies, chartered by different States, had

entered into an engagement to transport passengers over a road in a third State, beyond the limits authorized by the charter of either. It was held that they were jointly liable to a passenger for injuries resulting from the negligence of their employés in such third State.

In this case, in the opinions of COMSTOCK, C. J., and of SELDEN, J., the respective arguments for and against the principle which has been advanced, are stated with great ability. COMSTOCK, C. J., was of opinion that where a contract, originally *ultra vires*, had been completely performed by the other party, a plea to that effect was unavailable to the corporation; that the question of *ultra vires* was either between the State and the corporation, or between a stockholder who was a member of the common partnership and the corporation represented by its directors, where the former sought to restrain the completion of an unauthorized act. This case is not cited as an authority, but merely to show the gradual drift of opinion in the State of New York.

But in the case of Whitney Arms Company *vs.* Barlow, 63 New York, 62, 68, and 69 (1875), the doctrine that the plea of *ultra vires* is inapplicable to the case of an executed contract, was laid down in the most distinct possible manner by the Court of Appeals, all the judges concurring.

This was an action brought by the plaintiffs, a corporation organized in the State of Connecticut for the purpose of manufacturing fire-arms and other implements and munitions of war, and machinery adapted for the construction thereof, against the defendants, for a large number of railroad locks delivered by the former to the latter. One of the defenses was that the contract was beyond the power of the plaintiff company to enter into. "It must be conceded," said ALLEN, J. (at page 68), "that the manufacturing and vending of railroad locks is not within the purposes for which the plaintiff was

incorporated, or within the powers conferred by its charter. Neither is such business incidental to the purposes of the incorporation, or in any way necessary to, or, as far as appears, even an aid in the exercise of the powers conferred upon the plaintiff by its constitution, so that it could be regarded as among the implied powers granted by the legislature and assumed by the corporators.

"*Did the question now made arise upon an application by the stockholders and corporators to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation, or engaging in business outside of that for which the company was formed, or on proceedings by the sovereign power to annul the charter for an abuse of the powers granted, or in a proceeding to enforce and for the performance of an executory contract, where upon a rescission or annulling the agreement both parties would have the same position as if no contract had been made, the rules of decision would be different from those which must prevail in the present action.*

"In either of the cases suggested, it is very likely the courts would be compelled to give full effect to the objection, and hold the business unauthorized and a violation of the charter, and a forfeiture of the chartered rights and the contract null, and refuse to perform it or give effect to it. The manufacture of the locks or contract to sell them to the Seal Lock Company, were not acts immoral in themselves or forbidden by any statute, neither *mala in sese* or *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action; such a contract as the law will not recognize or enforce, but applying the maxim *ex facto illicito non oritur actio*, leave the parties as it finds them.

"*When acts of corporations are spoken of as ultra vires, it is not intended that they are unlawful or even such as the corporation can not perform, but merely those which are*

not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created. [Citing Taylor *vs.* Chichester and Midhurst Ry. Co., L. R., 2 Exch., 356; Bissell *vs.* Mich. C. R. Co., 22 N. Y., 248]. Whetner the contract as originally made was *ultra vires* is not a very important inquiry at this time. If it was, the State under whose sovereignty it dwells, and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders, whose confidence has been abused, and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody, and applying to legitimate uses, the funds which have been diverted and improperly used for purposes *dehors* the legitimate business of the corporation. *The plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.*

"Here, as between two corporations, the debtor and creditor corporations, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal Lock Company has received the full consideration of its promises to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquired by contract and under an agreement to pay for it, the property of a corporation, can not defeat the claim for the purchase

price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, can not avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation.

"*It is now very well settled that a corporation can not avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action can not be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation* [citing many cases]. * * *

"The same equitable principle was intimated by Chancellor KENT, in Silver Lake Bank *vs.* North, 4 Johns. Ch., 370). Parish *vs.* Wheeler, 22 N. Y., 494, proceeds and was adjudged upon this general rule, C. J. COMSTOCK enunciating the doctrine that *the executed dealings of corporations must be allowed to stand for and against both parties, where the plainest rules of good faith require.*

"Palmer *vs.* Lawrence, 3 Sandf. Sup. Ct. R., 161, lays down the proposition in more comprehensive terms. Judge DUER, speaking for the court, says: "The general rule which is fairly deducible from all the cases on this subject is that a defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to con-

tract or sue." The proposition may not be true in respect to contracts executory and wholly unexecuted; we do not pass upon that. It was decided in The Steam Navigation Co. *vs.* Weed, 17 Barb., 378, that when it was a simple question of capacity to contract arising either on a question of regularity of organization, *or of powers conferred by the charter*, a party who has had the benefit of the contract can not be permitted, in an action founded upon it, to question its validity. Judge PARKER'S opinion, to which nothing need be added, is well fortified by the many cases to which he refers, and which, aside from the argument of the learned judge, abundantly sustain the judgment. Among the cases referred to and commented upon by Judge PARKER, are State of Indiana *vs.* Woram, 6 Hill, 37 (1863); Chester Glass Co. *vs.* Dewey, 16 Mass., 94; Steamboat Co. *vs.* McCutcheon, 13 Penn. St. R., 13.

"*It is very evident, as well upon principle as upon authority, that had this action been against the debtor corporation, the objection that the contract was not authorized by the charter of the plaintiff, would have been untenable, and the plaintiff would have been entitled to recover.*"

See to the same effect, Steam Co. *vs* Weed, 17 Barb., 378 (1853); Moss *vs.* Mining Co., 5 Hill, 137 (1841).

The same principle has been maintained in the latest cases in Pennsylvania. In Grant *vs.* The Henry Clay Coal Company, 80 Penn. St. R., 208, 218 (1875), the corporation had brought suit to recover the price of coal furnished the defendant. Held, that the latter could not raise the question of the due incorporation of the plaintiffs in such a suit. "Having dealt with the defendants in error as a *de facto* corporation, there is little merit in the defense now taken, that they were not duly incorporated, and had no right to sue for the coal, which, it is admitted, they delivered." Per PAXSON, J.

In Oil Creek and Allegheny River Railroad Company against Pennsylvania Transportation Company, 83 Penn. St. R., 160 (1877), the latter corporation had brought an action against the Oil Creek, &c., Company, to recover the amount due upon a contract which was alleged by the defendant corporation to be *ultra vires*. The court below reserved the question of *ultra vires*, and finally entered judgment for the plaintiff, saying, that it was inadmissible to say that they could not make the contract in question, inasmuch as they had made it, and acted under it. "The other portion of this point, whether the making of such a contract was a lawful exercise of corporate functions by the parties, is therefore quite irrelevant. *We are now to deal with the actual facts, not with the functions.* We may not legally make certain contracts on Sunday. But suppose them made and partly performed, then the function of the law changes. *The statute does not, in fact, avoid this agreement, and the defendant did not annul it as an unauthorized act of their directors, but took all the benefits it afforded them.* And now we must judge of the duties of each to each by their acts much more than by their functions. This point is therefore decided in favor of the plaintiff."

Justice PAXSON delivered the opinion of the court in January, 1877:—

"Was the contract upon which the plaintiffs were allowed to recover *ultra vires?* * * * *

"Neither proposition presents a question of serious difficulty. It does not appear to have occurred to the defendants below that the contract of July 26th, 1871, was *ultra vires*, until it became apparent that by their subsequent modification of it they had made a bad bargain. They then attempted to repudiate the modification and fall back upon the original agreement of July 26th. Yet the illegality, if any existed, was to be found in the

original contract. Assuming that to be legal, the modification of it was equally so. *We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. There were mutual covenants and mutual advantages. The defendants had enjoyed the advantages, such as they were.* To the extent of the demand in this suit the contract was executed, and to say now that it is *ultra vires*, comes with an exceedingly bad grace from the defendants. It may be that having shown performance on their part, they would have a right to rescind the contract as to future transactions upon the ground of its illegality. Upon that point we express no opinion. But there is no rule of law which permits them to retain both the benefits and the price. So far as the contract of these parties may be said to be against public policy and transgression of their respective charters, there is ample remedy. There is a mode by which the Commonwealth may call a corporation to account where it violates its charter, or the rights of the people. The rights of the Commonwealth are in no manner involved in this suit."

The same principle is maintained in the case of McCluer *vs.* Manchester and Lawrence Railroad, 13 Gray, 124 (1859). This was an action of contract against a corporation created by the laws of New Hampshire, to recover the value of merchandise delivered by the plaintiff to them to be forwarded. The defendants, the railroad corporation, were allowed to give in evidence a lease by which the Boston and Maine Railroad agreed to grant to the defendants, a foreign corporation, the use of part of the road in Massachusetts over which the goods were to be transported. The defendants contended that being a foreign corporation, and not authorized by the laws of Massachusetts to act in their corporate capacity within that State, or to lease the railroad over which the goods were to be transported, the lease was *ultra vires* and void,

&c. "It is no sufficient answer," said HOAR, J., "to this proof to suggest that the defendants were not authorized by their charter in New Hampshire to make such a contract, or to appoint agents for such a purpose. *If a corporation created by the laws of another State whose existence and legal organization are not disputed, is found making contracts within this State through agents which it employs, and a suit is brought in such a manner that the corporation is made amenable to the jurisdiction of our courts, in our opinion it is not necessary for the plaintiff who seeks to enforce the contract to furnish in the outset any other evidence of the capacity of the corporation to make a contract.*" Here, it will be seen, was a case in which the defendants, after performance by the other party of their side of the contract, were not allowed to raise the defense of *ultra vires*, grounded upon their inability to take a lease not permitted by the laws of the State in which the action was brought.

The same principle is stated in the case of Gifford *vs.* New Jersey Railroad Co., 2 Stockton, 177 (1854). That was a bill for an injunction to restrain the defendants from building a bridge, on the ground that it would impair the plaintiff's rights as a shareholder in the bridge company, and depreciate his stock. "But the objection," said VANARSDALE (who was called to advise with the Chancellor), "that the New Jersey Railroad Company has no right to build this bridge under this act, and other acts alleged to be inoperative or unconstitutional, *can not be considered in a proceeding of this kind; any usurpation in this respect is a proper case for the Attorney-General in an information filed on behalf of the State.*"

Nor has a different view been adopted in this court. Thus in Galveston *vs.* Cowdrey, 11 Wallace, 459, 476 (1870), Mr. Justice BRADLEY says: "Supposing the complainants to be *bona fide* holders of the bonds held by them, the question raised by the objection amounts to

this: Can a corporation repudiate a mortgage given to secure its bonds, held by *bona fide* holders, on the ground that its directors authorized its execution by a resolution passed outside of the limits of the State, the mortgage being, in other respects, executed and recorded in due form of law? Can it take all the benefit of the transaction—get off its bonds on the business community, and then repudiate this mortgage for such a cause? We have not been referred to any case like this. It would seem at first blush to be a very hard case if such a rule exists. * * Whoever may, under similar circumstances, raise an objection of this kind, it ought not to lie in the mouth of the company to raise it."

And in Smith *vs.* Sheeley, 12 Wallace, 358, 361 (1870), Mr. Justice DAVIS said: "It is insisted, however, as an additional ground of objection to this deed, that the bank was not a competent grantee to receive title. It is not denied that the bank was duly organized in pursuance of the provisions of an act of the Legislature of the Territory of Nebraska, but it is said it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained, but this defect in its constitution can not be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it, and *in such a case the party who makes a sale of real estate to it, is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase.*"

And the same rule has been followed in other States. Thus, in Kelly *vs.* Transportation Company, 3 Oregon, 189 (1870), the suit was for partition against the defendants,

who consisted of a corporation and of several individuals. The individual defendants claimed that they were entitled, as against the corporation to a moiety of the land. It appeared that the former had sold their moiety to a corporation, by which corporation it had been resold to the corporation defendant. There was no express authority in the charter of either corporation to purchase and hold the lands in question. The defendants offered evidence to show that they were not necessary to the objects of either corporation at the respective dates of purchase, and argued that it had been purchased by the defendant corporation, to prevent competition in their business. The court refused to hold the act of the corporation defendant *ultra vires*, saying that the proper remedy was an action in the name of the State. The court further held that the original purchase was not void though possibly voidable, in which case it could only be set aside in a court of equity by returning the consideration.

Weber *vs.* Agricultural Society, 44 Iowa, 239 (1876). In this case a mortgage to secure a loan had been made by the defendants to the plaintiff's assignor. Upon the mortgage being sued out some of the defendants' stockholders intervened, and asked that the notes secured by the mortgage, and the mortgage, should be held void as against the society on the ground of *ultra vires*; and that the plaintiff should be restrained from prosecuting his suit. Judgment was given for the plaintiff upon the mortgage. The Supreme Court affirmed the judgment (page 248), on the ground, *inter alia*, that after the money had been loaned to the corporation, "* * * * *nothing more remained to be done.* The only way she or her assignee (*i. e.* the plaintiff), can be made whole, is the repayment of the money.

"*As we understand the rule*, ultra vires *prevails in full force only where the contracts of corporations of this character remain wholly executory.*"

In Showalter *vs.* Pirner, 55 Missouri Reports, 233 (1874), it was held that, where land had been sold to the corporation, the question of whether it was a violation of the latter's charter to receive the conveyance, could only be determined by the State in a prosecution instituted for that purpose, and not in an action of ejectment for the land. To the same effect see Chambers *vs.* City of St. Louis, 29 Missouri, 543, and Land *vs.* Coffman, 50 Missouri, 243 (1872).

In Wade *vs.* Colonization Society, 7 Sm. & Mar. (Miss.), 663, 697 (1846), the Colonization Society filed a bill against Wade and others, executors of one Ross, deceased, averring that the testator by his will had directed his slaves to be sent to Africa, under the complainant society, and prayed that the directions of the will might be carried out. The court were of the opinion that the execution of such a trust was authorized by the plaintiff's charter; but if not * * * * "*according to the authorities, this question can only arise between the corporation and the State which granted the charter.*"

The same principle has been well stated in the langauge of the Chancellor in Robbins *vs.* Embrey, 1 Sm. & Mar. Chan., at 268–9 (1843), above quoted.

IV. If the contract were originally *ultra vires*, it was ratified, and for the future, authorized by the act of 10th April, 1867 (P. L., of New Jersey, of 1867, page 915; Record, 40).

It is a well-settled principle of law that subsequent statutes, by implication, ratify and legalize former unauthorized proceedings of a corporation, where the unlawful act is mentioned or referred to in the statute as a proper one; and if the act be a continuing one it is authorized for the future.

A single case will suffice as an illustration:—

In The Ecclesiastical Commissioners for England *vs.* North-eastern Railway Company, 4 Chan. Div. 845; 1877, the plaintiffs claimed damages done their mine by the Hartlepool Railway Company (which was subsequently amalgamated with the defendants) while the latter were working adjoining mines owned by them. In the same year in which the injury was done, an act of Parliament was passed, by the fifty-first section of which it was provided that "within five years after the passing of this act the company, or, as the case requires, the trustee for the company, to the extent of the estates, shares, rights, or interests of the company in all collieries in which the company now have any estates, shares, rights, or interests, may and shall sell and absolutely dispose of the same either by public auction or by private contract, and on such terms and conditions as the company shall think proper; and the net moneys produced by the sale and belonging to the company shall, so far as they extend, be applied only in paying off principal moneys then secured by debentures of the company, or in the redemption of redeemable class A stock."

It was argued for the defense (at page 851) that the West Hartlepool Company had no power to work coal mines, and that if the act of 1863 had been intended to give power to work the mines, this power would have been expressed. It was, however, held that although the working of the mines by the West Hartlepool Company was clearly *ultra vires*, the act of Parliament, of 1863, legalized the holding and working of the mines by that company. In the words of the Vice-Chancellor, "These matters having come before Parliament in 1863, when the West Hartlepool Company desired to obtain additional powers, an act was passed in that year which does not in terms recite the fact that the

West Hartlepool Company were working collieries, but it does that which is equivalent to it, and, in my opinion, most distinctly legalizes, by the fifty-first section, the holding of these collieries by the company; because it gives the company power to sell and absolutely dispose of all collieries and coal royalties in which the company had any interest, on such terms and conditions as the company should think proper. Therefore, this authorizes them within five years to sell the colliery. That recognizes the fact that they had collieries to sell, and having collieries to sell, it recognizes the fact that they were working collieries; *and having authorized them to sell these collieries within five years, I agree * * * * that that is an implied authority for the West Hartlepool Company* to work the colliery during the period within five years, up to the sale taking place. From 1863 to 1868, therefore, they are authorized by act of Parliament, in my opinion, to work collieries, and that which was *ultra vires* up to that time by this act of Parliament became legal; and they were the legal and authorized owners of the collieries, and were authorized at any time within that period to sell them, as sell them they did. That, I think, disposes of the question of '*ultra vires*.'"

We have endeavored, in the foregoing argument, to show:—

First.—That the contract in question was within the power of the Millville and Glassboro Railroad Company to make.

(*a.*) Because the contract was expressly authorized by the act of incorporation; and under this head we have shown language in the charter applicable to the powers exercised, and that the Legislature of New Jersey must

have supposed the original authority sufficient, by the language used in the act of April 8th, 1867. (Pages 7–10.)

(*b.*) That the contract was impliedly authorized, being a mere appointment for a limited time of agents, to whom were delegated many of the duties possessed by the higher employés of the road. (Pages 10–25.)

(*c.*) That the present case must not be confounded with those wherein a dissenting shareholder has, in a court of equity, restrained the execution of a contract whereby a railroad company proposes to employ its funds in a manner not authorized by its charter; nor with those in which a common law court has held such contracts to be impliedly forbidden by the legislature, and hence void as against public policy; although the authority of the latter class of cases has been much shaken by the late decisions. (Pages 25–9.)

(*d.*) That the argument of *ultra vires* is inapplicable even to a lease *made by a railroad corporation to individuals*, for the reasons given in Robbins *vs.* Embry, *supra*. (Pages 29–32.)

(*e.*) That the objection that the contract provided that the plaintiffs should be liable for the improper management of the road is of no force, as this was merely an agreement between the parties by which the duties of the corporation could in no way be modified. (Pages 32–3.)

Secondly.—That the contract was authorized, inasmuch as it was germane to the objects of incorporation, would have been valid at common law, and was not forbidden.

Under this branch of the argument we endeavored to show:

(*a.*) That at common law a corporation might do any act which a natural person might have done, because all incidents were impliedly annexed. (Pages 33–4.)

(*b.*) That now a corporate body might do any act not prohibited, although, where the act was unauthorized by the charter, a shareholder might enjoin its execution, and the State might forfeit the charter. (Page 34.)

(*c.*) That a corporation has *the inherent power* to dispose of its property in the same way that an individual has, although a contract to do so may be void as against public policy, if forbidden by the charter expressly or by implication; and that in the present case *the corporation was expressly empowered to convey its property for any purpose necessary or proper for the objects of its incorporation.* (Pages 34–5.)

(*d.*) That the question therefore was:—Has the contract been prohibited, and, if so, has the illegal part of it been completely performed by the parties? (Page 35.)

(*e.*) The authorities are then examined upon this question, and the conclusion reached that where the contract was not forbidden, it might be enforced where the shareholders had assented. (Pages 35–45.)

(*f.*) That this was a case of prior unanimous assent, and of subsequent unanimous ratification, and that the illegal part, if any, of the contract had been completely executed. (Pages 45–9.)

Thirdly.—That in any event, the defence of *ultra vires* was inadmissible in an action by or against a corporation where the contract had been partially or wholly performed, and no objection had been made by the shareholders.

(*a.*) No relief is granted, even in equity, where the shareholder has acquiesced in, or encouraged the contract sought to be set aside. (Pages 49–51.)

(*b.*) It is not necessary, in order to prove acquiescence, to show absolute knowledge in every shareholder. (Pages 51–4.)

(*c.*) When the transaction is complete, the plea of *ultra vires* in an action at law, is never admissible. (Pages 54–67.)

Fourthly.—That the unauthorized acts, if any, had been ratified and authorized for the future by the act of 8th April, 1867. (Pages 67–9.)

A. SYDNEY BIDDLE,
P. L. VOORHEES,
GEORGE W. BIDDLE.

DECEMBER, 1879.

Supreme Court of the United States.

Thomas et al.

vs.

The West Jersey Railroad Company.

REPLY TO THE ARGUMENT OF THE DEFENDANTS IN ERROR.

In the plaintiff's brief in this case it was argued:—

(1.) That the charter authorized the contract.

(2.) That the contract was a valid one, being neither expressly nor impliedly forbidden; under the principle that (to use exact language), a corporation has *power* to enter into any act whatever (as to commit a tort, *e. g.* to publish a libel), and that the question of validity depended upon whether the act was forbidden, expressly or by implication, in which case the contract could not be required to be executed, as being opposed to public policy; and it was urged that the doctrine of *ultra vires* was nothing more than a short way of expressing this principle when applied to those cases in which the contract was impliedly forbidden by the charter, no authority to execute it being contained therein, or impliable therefrom, because opposed to the object of the incorporation.

(3.) That where a contract has been completely executed by one party, he can recover from the other the consideration agreed upon in a forbidden contract, because the forbidden part has been executed, and to prohibit recovery

would encourage roguery, while it would in no way benefit the community or replace the corporation in its former position as regards the public.

(4.) That any invalidity in the original contract was cured by a supplemental act.

To these reasons the defendants have replied :—

(1.) That they were not liable in this form of action.

(2.) That the contract sued on could not be enforced because *ultra vires*.

The first point, though not taken below, must be answered before we can recover.

The argument is, that a suit of covenant can not be maintained against one who has not sealed the contract. This principle is erroneous, the case of Maule *vs.* Weaver, 7 Barr, 329, upon which it rests, having long since been overruled, and the contrary doctrine is now well settled (Weidner *vs.* Foster, 2 Pen. & Watts, 23; Royer *vs.* Ake, 3 *Id.*, 464; Hanna *vs.* Ewalt, 6 Harris, 11; Miller *vs.* Kern, 7 Weekly Notes of Cases, 505). The argument is however immaterial, as, if correct, it would only apply to a case of pure purchase and sale. With such a hypothesis we need not deal. This was not an authorized purchase and sale, but *a merger and consolidation*, by which a new corporation was created out of two former ones, and *ipso facto* became an original debtor and creditor of the respective creditors and debtors of the two first corporations. It stood, *qua* the privileges and obligations of each, exactly in the place of that corporation, and was no more a mere purchaser than would be a corporation the name of which was changed by the legislature. This is a case of identity, not of privity. (Record, 41–4; 44–5.) That in such case all obligations survive (the form of action being often, as here, an essential part of the claim), has been so repeatedly decided that we refer but to three cases; Phil., Wil. & Bal.

vs. Howard, 13 Howard, 307, 332–3; Phil. & Wil. Rd. Co. *vs.* Maryland, 10 Howard, 376, 393–4; Tomlinson *vs.* Branch, 15 Wall., 460, 465.

Two other minor objections are mentioned on pages 2-3 of the defendants' brief, viz.: (1.) that immediate notice upon the termination of the contract; and (2.) the procuring of an award, were conditions precedent to the plaintiffs' right of recovery. To the first of these objections it is sufficient to say that it was urged upon the trial below with great earnestness, overruled by the court, and exceptions to the ruling taken by defendants' counsel. As the objection does not appear upon this record, it is not deemed necessary to discuss the point further. The answer to the second objection is obvious. Apart from all legal consideration, the record shows that no objection was made to any of our offers, on the ground that they were irrelevant unless supplemented by further proof of an award (or its equivalent,—conduct of the defendants which prevented the obtaining of an award). This objection was a competent one; and, if made, the plaintiffs must have either shown that no award was, by the terms of the contract, necessary as a condition precedent to action, or must have offered evidence of the kind mentioned above. The objection and the rulings were directed solely to the validity of the contract, and the defendants are, of course, precluded from taking an objection here, which, presumably, we could have answered by evidence in the court below. When the objection is properly made, the plaintiffs will endeavor to show its immateriality.

1. It was first argued for the plaintiffs, that the language of the charter gave express authority to execute a much more comprehensive contract than the present one.

Our opponents do not attempt to answer this, except by saying (pages 18, 19, of their brief) that "To state that such a clause in a charter conferring important privileges and franchises, authorizes the corporation to abnegate its

functions, and delegate them to others, carries with it its own refutation. Mr. Brice is then referred to, to show that *without authority in the charter*, a railroad company can not give the exclusive control of the line and its franchises to others. No attempt is made to explain the purport of language in the charter which gives the broadest authority for such an act as the present, and its inapplicability to so-called traffic arrangements is conceded, as it is admitted that they "are permissible, even without the authority of an act of the legislature" (page 18 of defendants' brief). They are therefore driven to assert that a clause of the most comprehensive character possible in a charter, the unrestricted meaning of which is shown by a subsequent act of the legislature, is superfluous and must be stricken from the act, inasmuch (they argue) as all powers, which the defendants suppose were intended to be conferred by it, were inherent in the corporation without the special grant; and no other powers could have been intended to have been granted, because not inherent in the corporation in the absence of the special grant.

It seems to be supposed that we have attempted to argue that the contract in question possessed none of the characteristics of a lease (pages 14–19 of defendants' brief). Our position was that upon an examination of the instrument, it could not, as a whole, be said to be a lease, but that, whether a lease or not, it did not fall within the English decisions holding certain leases void (see plaintiffs' argument on the first point).

2. It was argued for the plaintiffs that a contract of the kind described was valid, *as between the corporation and third parties*, because not forbidden either expressly or by implication. Not a single authority opposed to this proposition is referred to. The case of Earl of Shrewsbury *vs.* R. W. Co. (page 8 of defendants' brief), was a bill in equity to enforce a contract entered into between a peer of England and

the company defendant, by which the latter agreed to pay the former for his countenance and the withdrawal of his opposition to the passage of a bill which the company were trying to get through Parliament, and for no other consideration whatever, £20,000. It is not to be supposed that, if a senator of the United States sought in this court to enforce a bribe of $100,000 for the withdrawal of his threatened opposition to the passage of a private bill through Congress, he would be readily listened to. The language of Mr. Brice is also relied on (pages 608–9 of his book); but if the reader will turn from the text to the notes, it will be seen that the American authorities, approved by the American editor, support the opposite doctrine (see notes to pages 608–9 of Green's Brice's Ultra Vires). The only decision cited by Mr. Brice in support of the language quoted, is the National Permanent Benefit Building Society, *ex parte* Williamson, L. R., 5 Chan., 309. The American editor considers it *doubtful "whether this case supports the proposition* (I.) *in the text* [*i. e.*, the citation on page 9 of the defendants' brief]; *it seems rather to imply the contrary doctrine.*" (Note † to page 612 of Green's Brice's Ultra Vires); and on page 620 of this work the English author cites this very case in support of a very different principle, viz. (page 614 of Green's Brice, III.): "Sometimes, if not always, where, in pursuance of *ultra vires* agreements, money has been lent or paid to a corporation, and there has been a total failure of the consideration for which the loan or payment was made, the lender or payer is held entitled to be recouped by the corporation to the extent to which it has benefited thereby."

But Mr. Brice himself elsewhere states the question, in cases of this kind, to be as we have put it on page 35 of our brief.

"Whether a special corporation has only those powers which are expressly given to it by its constating instrument, or has all such as will conduce to the attainment of

its ends, save such as are, by direct provision in its constating instruments, or by necessary inference from the same, denied it" (page 39, Green's Brice. See the cases cited by the author, on pages 39–42). "Finally, in the latest case on the subject, and one where the question was very thoroughly examined, viz., that of Taylor *vs.* Chichester and Midland Railway Company, BLACKBURN, J., approved of the same (viz., of Lord WENSLEYDALE'S statement that "that there can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, *except where the statutes by which it is created or regulated expressly or by necessary implication prohibit such contracts between the parties*"), adding, "I think, therefore, we are entitled to consider the question to be, not whether the present defendants had, by virtue of the acts of incorporation, authority to make the contract, but whether they are *by those statutes forbidden* to make it." "As this view has also been taken (concludes the author) not only by the different members of the House of Lords, and by the Court of Queen's Bench, * * * * * and by the Court of Exchequer, * * * * * but also by the Court of Common Pleas itself, *we may conclude that it is now established, that this is the true mode of expressing the doctrine.*" (Green's Brice, 41–2.)

In the case of Ardesco Oil Company *vs.* N. A. Mining and Oil Company, 66 Pa. St. (16 Smith), 380 (1870), SHARSWOOD, J., uses the following language:—

"The remaining errors complained of in the 6th and 7th assignments, may be considered together, namely, that the directors of the corporation plaintiffs had no power to make the lease sued on. It is supposed that a company, chartered for the purpose of manufacturing and refining oil can not lease its entire property, and so defeat the very purpose for which its charter was granted. *But corporations, unless expressly restrained by the act which establishes*

them or some other act of Assembly, have and always have had an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property. Hence an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter: Dana *vs.* Bank of the United States, 5 W. & S., 223. If they can alienate absolutely, they may lease, which is but a partial or temporary alienation. *Omne majus continet in se minus.*" The case cited merits examination. See the argument of Messrs. Sergeant and Hubbell, pages 234–6, and the opinion of KENNEDY, J., 243–8 (5 Watts & Sergeant). It was there held that the directors of the Bank of the United States had authority to assign all their property for the benefit of a preferred class of creditors. This was the case of a *quasi* public corporation, incorporated by act of Congress, in which the whole people of the United States were interested. And see Gordon *vs.* Preston, 1 Watts, 385, 387 (1833). There it was held that a bridge company, to erect and maintain a bridge over the river Susquehanna, was entitled to mortgage its real estate. The charter permitted the company to sell and dispose of their real and personal estate at pleasure. The mortgage was executed in such manner that it did not originally bind the corporation. Held, that the absence of dissent by the stockholders amounted to a ratification of the act originally invalid. "But the maxim," says GIBSON, C. J., "which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent. * * * *

In The Silver Lake Bank *vs.* North, 4 Johns. Chan., page 373, it was supposed that the right of a bank to take a mortgage as a concurrent security, though prohibited by

the charter, could be contested only by the State, in a direct proceeding to establish a forfeiture, and not collaterally by a stranger."

We are also told (page 9 of defendant's brief) that "it is sufficient to say that this doctrine is deduced from the latest English authorities, all of which have been considered by Mr. Brice, including those relied on by the plaintiff. It is admitted that some of them are seemingly in conflict. But it is well settled that no action can successfully be maintained at law upon an agreement, if it be once established that it lies beyond the power of the corporation to make it." Without referring again to the cases of Mayor of Norwich *vs.* Norfolk Ry. Co., Taylor *vs.* Ry. Co., South Wales Ry. Co. *vs.* Redmond, Bateman *vs.* the Mayor, and to the numerous American cases cited (see plaintiffs' brief) in which the opposite doctrine is laid down, we may be permitted to mention the case of Rich *vs.* Ashbury Ry. Carriage and Iron Company, L. R., 9 Exch., 224, cited in a note to page 41 of Mr. Brice's book, being a case later than any one mentioned in the text of the volume itself, and of which, as an instructive case, mention is made by the editor, who refers us particularly to the observations of CHANNELL, B., and of BLACKBURN, J. (now Lord BLACKBURN). This case is a much weaker case than ours, for the contract was executory, and it was unanimously held in the Exchequer and Exchequer Chamber to be *ultra vires;* but it was decided by the majority of the court that these contracts had been ratified by the shareholders, and judgment was given in both courts for the plaintiff. The case was one of great importance, was argued by the ablest counsel in England (several of whom have since become judges); and every case up to that time was brought to the attention of the court. To the same effect is the case of Stephens *vs.* Monongahela National Bank, 7 Weekly Notes of Cases, Philadelphia, 491, 495. There, in a suit by a corporation against the maker

of a renewal note, the defendant offered to show that (page 492) the note in suit was one of several notes discounted by the plaintiff bank under an agreement to discount notes *to evade section* 5200 of the Rev. Stat. of the United States, the loans being in excess of the plaintiffs' power and authority to make. The offer was refused, and judgment given for the bank. The Supreme Court of Pennsylvania affirmed the judgment on the 9th of January, 1879, holding that *though forbidden*, the contract was capable of being enforced; and that although it was provided by the National Banking Act that a willful violation of any of the provisions therein should forfeit the franchises of the Association, such violation could only be determined by suit brought by the comptroller of the currency in the proper court of the United States. "Of course," says TRUNKEY, J., "we have considered the offer as true, namely, as a conspiracy between the bank and the borrower to violate statutory regulations. The question is whether the note is invalid on general principles of policy, and not one of equity and justice between the parties. The public good is the ground of relief to a defendant who proclaims his own turpitude in the willful violation of a statute, and his shame in refusing payment of what he justly owes; not his worthiness."

It is then sought to be shown (pages 11–13) that the contract was *ultra vires*, and therefore, it was argued, void; because such a contract would be voidable, as was alleged, as against the State.

We have seen that, though *ultra vires*, the contract may be enforced, either when ratified by the shareholders, as in Riche *vs.* The Ashbury Railway Company, *infra*, or where completely performed. The argument advanced by defendant, and the cases cited, do not show that the contract was void. A distinction is attempted to be made between public and private corporations, and it seems to be admitted that an ordinary trading corporation stands upon a different

ground from a railroad company. But there are no cases cited to support this distinction, and while we admit that many things may be *ultra vires* of the corporation, that is, forbidden by the charter, as against the State at any time, when the State intervenes by her attorney-general, or as against shareholders where they intervene in time, we find in the numerous cases cited, and in the opinions of the very author and his editor, so highly commended by the defendant's counsel, that that may be *ultra vires* as against one party (*i. e.*, the State) and not as against another (*i. e.*, the contractor), and may be even admittedly *ultra vires*, and yet enforceable where the contract has been wholly executed. The works and decisions referred to on pages 13 and 14 of the defendant's brief fail, when examined, to show any contradiction to the principles advanced in our brief. They are, for the most part, attempts by shareholders in equity to restrain the execution of a contract, and are not suits at law upon contracts performed.

The case of Miners' Ditch Company *vs.* Tellerbach, 37 California, 579 (cited on page 10 of defendant's brief), does not conflict with our argument. In that case it was held that a corporation organized for the purpose of owning ditches for the conveyance and sale of water, possessed the power of selling and conveying all its corporate property, provided the sale was made for corporate or lawful purposes; and strangers taking a conveyance had a right to assume, as against the corporation, that the sale was for a lawful purpose. In this case it was held that the plaintiff could recover against the corporation, and many of the cases contained in our brief were cited by SAWYER, C. J., with approval.

3. It was shown in the plaintiffs' argument that where a forbidden contract had been completely executed by one party, so that the illegal acts had been performed and nought remained but the fulfillment by the other party of

the agreement for compensation, an action at law could be maintained on that agreement.

As no answer is made to this proposition, which is supported, as we have seen, by cases in a large number of States, it is presumably sound. But it is said, on page 20 of defendants' brief, being the only place in which notice is taken of this argument, which the defendants are mistaken in thinking (page 5 of their brief) was not pressed upon the court below, "that it is the sovereign State, and not the stockholders, that objects to the usurpation of a public trust, and that this contract had not been performed, but on the contrary, the present action was to recover damages for the prevention of performance."

The sovereign State of New Jersey not being represented by the defendants in this litigation, it is difficult to see that she has objected to any usurpation of a public trust; but it is more difficult to understand the contention that this is a suit upon an executory contract.

It was expressly agreed that we were to be employed as agents by the railroad for twenty years. If we were sooner dismissed, we were to be paid the value of that employment to ourselves. If the latter provision had not been inserted, this would be an action, as stated by the defendants, to recover damages for the prevention of performance. But inasmuch as the contract of service was lawfully terminated by the defendants, under the authority contained in the agreement, we are not suing on the breach of an agreement to continue to employ, but upon an agreement to pay if we were dismissed before the end of the term; and it is a singular argument to say that we are to get nothing because we no longer perform the work, when the non-performance of the work is no adequate consideration for the loss we have incurred. Three men have devoted five years of their lives to building up a business, on the understanding that they were to enjoy the results for twenty years, either directly or by compensation, and when the contract is lawfully put an end to by an agreement under which

they are to be fully compensated, they are refused compensation because they were fully paid for the time they served, and they had no right to a longer term. They were not fully paid for the time they served, and it was in view of this fact that the contract to pay was inserted. The contract is as fully executed as would be one in which I employ a man for twenty years, with a proviso that I may dismiss him on paying half his salary for the unexpired term. I dismiss him at the end of ten years, and then tell him that, as I have only gotten ten years' services, I can not afford to pay him for the ten years he has not served. Courts have ordinarily considered such contracts as executed in exactly the same way as if the services had been fully performed, and the test is that an *assumpsit* would lie in such a case, *when the contract for services had lawfully been ended*, for the compensation agreed to be performed.

4. Lastly, it is argued that the act of 13th April, 1867, was not a ratification of the execution of the agreement. Upon this point we fail to see the force of the argument. It is said (page 4 of the defendants' brief) that the term *lessees*, used in the act, must mean lawful lessees. Undoubtedly, and hence, as there were then no lawful lessees, the word was only to be applicable, if at some future time the legislature chose to authorize a lease, in other words, that the word is to be struck out. We are not authorized, however, to deal in this way with acts of Assembly, and must presume that, as the public knew the fact of the operation of this road by persons who were properly described in popular language as lessees, at the time the act was passed, the words were purposely inserted to show the recognition of this very fact by the legislature, and of the construction of the original act of incorporation by that body. The case of Parmalee *vs.* Thompson, cited by defendants on this point, decides that the recital of a fact in a statute *is evidence as against the State, and against any one claim-*

ing under the State, and no stronger authority for our position could be produced; and the Kent Coast Railway Company *vs.* London, Chatham and Dover Company (cited by defendants, page 22), admits that if it were shown that the matter was brought to the attention of Parliament the case would be otherwise.

What is this doctrine of *ultra vires?* It is but a legal fiction lately introduced into the law for the purpose of doing justice. It is but a short name for a broad principle of protection to the community and to the stockholder. How little settled the law is upon the subject may be gathered from the numerous instances pointed out by Mr. Brice in his preface, in which absolutely the same act has been held to be void or lawful according, apparently, to the caprice of the particular court before whom the case happened to be brought. The doctrine is as much an invention as that of the implied trust, or the doctrine of equitable assets, and can not be invoked, as the cases show, to work injustice. Where the State does not object, and the stockholders have not only ratified, but been enormously benefited by the act which a stranger has performed, justice and honesty require that the latter should be compensated for what he has done.

A. SYDNEY BIDDLE,
PETER L. VOORHEES,
GEORGE W. BIDDLE,
Of Counsel with Plaintiffs.

In the Supreme Court of the United States.

October Session, 1879. No. 169.

George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, Plaintiffs in Error,

vs.

The West Jersey Railroad Company, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

This was an action of covenant against the West Jersey Railroad Company upon a contract executed under the corporate seal of the Millville and Glassboro Railroad Company, on the 8th of October, 1863, to recover the alleged value of an unexpired term of a lease or agreement for operating the railroad of the latter company. A consolidation or merger of the two companies was made under the authority of an act approved March, 1868, in pursuance of an agreement which is substantially recited in the preamble of the act (pages 41 and 44 of Record). By the first section of the act, the transfer of property and franchises was to be made "subject to the debts, liabilities, and obligations of both of said companies;" but by the terms of the agreement each

corporation bound itself to pay off and discharge all its debts and liabilities except the funded debt of the West Jersey Railroad Company.

The contract under which the claim is made, provided (page 32 of Record) that upon the termination of the contract, if requested, arbitrators should be appointed, whose award should be final. It was a part of the offer of the plaintiffs to prove (page 28 of Record) that they had given up possession on the 1st of April, 1868, and had given the notice (printed page 48 of Record) on the 13th of April to the president of the Millville and Glassboro Railroad Company (which had merged its existence in the West Jersey Railroad Company twelve days before), and that it had been handed to the president of the corporation defendant "on or about" the 13th of April; to be followed by evidence showing that an award had been made which had been set aside. The first count in the declaration simply assigns as the breach a refusal to pay the value of the lease; but the additional counts go upon the refusal to appoint arbitrators, or an alleged liability to pay after the award had been set aside.

It is obvious that two grounds of objection existed to the claim.

First.—It was an action of covenant against a defendant that had not sealed the agreement declared on. It might be that, by a properly-drawn bill in equity, relief might be had upon the ground that the property of the Millville and Glassboro Railroad Company had passed charged with liability for its debts; but it is well settled that the vendee who buys "under and subject" does not become liable on the original covenant of his vendor, and, in this case, the defendant as a purchaser would not be liable at law upon an implied *assumpsit*, as there was an express covenant in the agreement of merger that each should pay and discharge its own debts. And even if

these objections were not fatal, the giving of notice upon the termination of the lease, *i. e.* at the time possession was surrendered, and the procuring of an award, were both conditions precedent to the right of recovery.

These points were not formally made, as there had been an application for an injunction to stay the action at law; and the whole case having been argued at length, it was thought by the court that the agreement itself was illegal and invalid, and it was sufficient at the trial to rely upon that; but as the judgment must be affirmed if the offers by the plaintiffs were, for any reason, incompetent, it may be that this court will prefer to rest its judgment upon these preliminary grounds of objection.

Second.—The agreement was set forth, *in hæc verba*, in the first count of the declaration (page 3 of record), which alleges that the Millville and Glassboro Railroad Company "*did demise, lease, let, and to farm let*" its railroad, rolling stock, and other appurtenances to the plaintiffs, and the second section fully justifies the construction put by the pleader upon the contract. That is as follows:—

"*Second.*—That the party of the second part" (the plaintiff in error) "shall and will provide all the needful cars and engines for transporting, and will duly transport all passengers, mails, and freight, whether through or local, offering or delivered to them to be transported, *and shall and will fulfill all the duties and liabilities of the party of the first part to the public.*" (It is here proper to mention that the italics are our own.)

The third and fourth clauses provided as follows:—

"*Third.*—That the party of the second part shall and will, at their own cost, maintain the roadway or superstructure of the said railroad and the rolling stock thereof in their present good working condition; and shall and

will, at their own cost, defray all the expenses and charges of running said railroad, and the expenses of all current renewals or repairs, and shall and will, in pursuance of these provisions, keep and pay all needful and prudent persons for performing the labor necessary to fulfill their obligations as herein expressed; and shall and will furnish, at their own expense, all necessary materials, including fuel oil, tallow, and wash and pay all water-rents; and the party of the second part shall and will indemnify and save harmless the party of the first part and their property from and against all loss, outlay, and cost and damage for or by reason of any labor or material already or at any time hereafter so done or furnished, and from and against the claims of any person or persons therefor.

"*Fourth.*—And the party of the second part does hereby assume and take upon themselves all loss, cost, and damage of every nature, which may result to persons or property by reason of any matter or thing connected with this contract, and done or omitted by them thereunder, but not for any loss, cost, or damage incurred by act of God, or by act of the public enemies" (pages 4 and 5 of Record).

From these and other provisions it will be seen that the agreement of lease (pages 3–9 of Record) gave to the plaintiffs in error the exclusive control and use of the railroad of the Millville and Glassboro Railroad Company, and devolved upon them the exercise of all its duties and obligations to the public. This, by the law of New Jersey, the *lex loci contractus*, was clearly beyond the powers of said corporation, and, therefore, within the proper and strict meaning of the term, *ultra vires*. It was contended in the court below, (1.) That such a contract was not beyond the scope of the powers granted to the Millville and Glassboro Railroad Company by its charter; and (2.) That if it were, it had been ratified by the later act of 1867.

The learned judges of the court below negatived both these views, and excluded the agreement when offered in evidence. All of the subsequent offers were clearly immaterial and irrelevant, provided the agreement had been properly excluded.

It is now further contended that even if the contract were *ultra vires*, it is nevertheless enforceable in a court of law against the defendant, because it has been executed, although this action was brought to recover the value of the unexpired balance of the term.

BRIEF OF ARGUMENT.

First Point.—The defendant is not liable in covenant upon an agreement executed under the seal of another corporation.

It can not be necessary to go into an elaborate examination of the authorities bearing upon this point. During the last few years the question of the liability of a purchaser of property charged with an incumbrance has arisen very frequently. In the leading case in Pennsylvania of Campbell *vs.* Shrum, 3 Watts, 60, it was ruled that the purchase by agreement under seal, "subject to the payment of the purchase-money and interest" due to a third person, was a covenant by the vendee to pay such purchase-money and interest, on which an action might be maintained in the name of the vendor to the use of the creditor; but it was an action on the covenant which the defendant himself had signed, and it was well settled that a purchase "under and subject," only qualified the interest acquired, and no liability existed after a reconveyance. Walker *vs.* Physick, 5 Barr, 193.

Where the incumbrance really constituted a part of the purchase-money, it was clear that the parties

intended that the purchaser should pay it, and if not liable, as sometimes held, in a direct *assumpsit* to the creditor, he would be at least held under his undertaking to indemnify, as for money laid out and expended, Kearney *vs.* Tanner, 17 S. & R., 94; but no action of covenant could be maintained against one upon an agreement which he had not sealed. In Maule *vs.* Weaver, 7 Barr, 329, Chief Justice Gibson expresses his surprise that it should have ever come to be thought that an action of covenant could be maintained on any instrument against one who had not sealed it, and suggests that the singularity of the exception, which had its root in an obscure statement in Co. Litt., 331 *a*, should have sent the profession to the Year Books, when it would have been found, as Mr. Platt did find, that there had been "a prodigious misconception of the language of Lord Coke, which was predicated not of an action of covenant, but of an action of debt."

There was, however, such uncertainty in the law of Pennsylvania, that finally, in 1878, P. L., 205, the legislature provided that the grantee should not be personally liable, unless he should expressly assume such liability by agreement in writing, or condition in the conveyance; and in a series of decisions, in which the opinions were delivered by Sharswood, C. J., the court finally decided that such was the proper rule as to contracts of conveyance made before the passage of the act. See Stokes *vs.* Williams, 6 Weekly Notes of Cases, 473; Moore's Appeal, *id.*, 474; Samuel *vs.* Peyton, *id.*, 476; Thomas *vs.* Wiltbank, *id.*, 477.

It must be conceded, therefore, that the defendant was not liable in this action upon the agreement declared upon; and it is apparent on the face of the record that more would have to be shown before a liability could be established in any form of action, than was contained in the offers made by the plaintiffs. The Record shows (41–

44) that by the agreement each corporation was to pay off and discharge its own debts, excepting only the funded debt of the defendants; and that the defendant was to pay the price of the property by the issue of its stock. It is to be presumed that it did make the payment, and at all events, the plaintiffs were bound either to offer to show that they had given notice of the claim before the settlement had been made, or that they had not known of the transfer; in which case, if the vendee had bought in good faith, and paid full consideration for the property, the remedy would be by some proceeding in equity to follow the purchase-money into the hands of the stockholders of the vendor. There was no occasion however to develop this line of defense on the trial, nor to show that the giving of the proper notice of claim at the proper time and the obtaining of an award were conditions precedent to the right of recovery (Reynolds *vs.* Caldwell, 1 P. F. Smith, 298; Scott *vs.* Avery, 5 H. L. C., 811; Clearwater *vs.* Meredith, 1 Wallace, 25); though if sound, either must be perfectly available here, as the court below rightfully excluded the agreement upon the grounds to be considered under the next point.

Second Point.—The agreement declared on was *ultra vires*, and could not be enforced against the Millville and Glassboro Railroad Company or the defendant.

The questions arising under this point are familiar to the profession, and are elaborately discussed by Redfield and other text-writers; but an able work on the special subject of *Ultra Vires*, well known to the profession in this country as Green's Brice's Ultra Vires, was published in England in 1874, and appeared in this country in 1875, with careful annotations by Mr. Ashbel Green of the New York bar.

It was freely quoted from by both sides in the court below, and almost all the cases referred to in the brief of the plaintiffs in error are there cited, and many of them commented on at great length. As the work is a standard book of great authority, and presents all the authorities down to the time of its publication, it is believed that it will conduce to brevity and convenience to refer freely to that treatise.

We shall endeavor to show in this brief,

1. That when a contract of a corporation is *ultra vires*, *i. e.*, beyond the powers of the corporation, such contract is void and can not be enforced against the corporation.

2. That the contract or agreement of lease in this case was such a contract, and therefore void.

3. That it has not been ratified by the act of Assembly of New Jersey, of April 10th, 1867.

1. In Green's Brice's Ultra Vires, pages 34–39, the various meanings in which the term *ultra vires* has been employed are considered. It was there said: "The expression '*ultra vires*' has been used in at least two senses, as was pointed out by Kindersley, V. C., in the Earl of Shrewsbury *vs.* North Staffordshire R. W. Co., 35 L. J., Ch. 156, 172 (L. R., 1 Eq., 618). 'When you speak of *ultra vires* of the company, you mean one or other of two things; either that you can not bind all the shareholders to submit to it (*i. e.*, that you can not bind dissentient shareholders), *or* that it is *ultra vires* in this respect, that the legislature, for instance, having authorized you to make a railway, you can not go and make a harbor. * * * Some other meanings are also considered, that it is against public policy as an act in restraint of trade; but as Mr. Brice says, page 36, "the true and proper meaning" is "that a corporation has certain powers only, and that it can be bound only

when acting whether directly or by agents within the limits of those powers; and this is the signification which will, in this work, be given to the term when it is employed without any qualification."

The proposition is thus laid down in the same book, page 608:—

"1. The mere fact that a corporation has received the consideration of or otherwise derived advantage from a contract *ultra vires*, does not involve it in any liability upon such contract."

In reference to this it is said: "In considering this principle with reference to corporations, we have merely to bear in mind the meaning of the term *ultra vires*. Corporations can be bound, whether by their own proceedings or those of their agents, within certain limits only. Outside those limits they are not bound. Neither at law nor in equity will the other contracting party obtain any redress, in any form of suit upon the engagement itself from the corporation, whatever be the fraud or however urgent the refusal of such redress. Some of the harshest of these decisions have been entered into with promoters, which have already been noticed, and in several of which the corporation has owed its very existence to the agreement which it has afterwards repudiated."

Without reviewing for the present the cases cited as establishing this rule, it is sufficient to say that this doctrine is deduced from the latest English authorities, all of which have been considered by Mr. Brice, including those relied on by the plaintiff. It is admitted that some of them are seemingly in conflict. But it is well settled that no action can successfully be maintained at law upon an agreement, if it be once established that it lies beyond the powers of the corporation to make it. The apparent exceptions to the above rule are where special circumstances exist to induce the courts to intervene; but this can not be done by a court of law, but

by a court of equity. Upon principle, the doctrine is plain enough. Every corporation is vested with the powers which are granted to it by its charter, and no other powers. Every one dealing with a corporation knows this, or is presumed to know it. When, therefore, an agreement is made with reference to matters outside the scope of its powers, the other party to the contract is practically in the same position as if he had knowingly dealt with a person not *sui juris*. If the corporation should sue upon such a contract, it could not maintain the action, and because the law does not recognize unilateral contracts, it follows that the other party would be in a similar positian. In Miners' Ditch Company *vs.* Tellerbach, 37 Cal., 579, these views are well stated:—

"An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also, sometimes, said to be *ultra vires*, with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent, or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. When the act in question is one which the corporation is not authorized to perform under any circumstances, the defense is available to the corporation against all persons, because they are bound to know, from the law of its existence, that it has no power to perform the act; but when the act is authorized for some purposes, but not for others, the defense may or may

not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test, as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers; and if the court can see that the act to be performed is not necessarily beyond the powers of the corporation, for any purpose, the contract can be enforced; otherwise not."

See further notes to pages 427–430, and chapter III. ("Liability for proceedings which are absolutely *ultra vires*"), *id.* 608 *et seq.*, Green's Brice's Ultra Vires.

2. The contract in this case was *ultra vires* of the corporation and, therefore, void.

It will be found that the cases cited and relied on by the plaintiffs in error nearly all relate to dealings by private corporations or to alleged diversions of corporate funds from corporate purposes. Undoubtedly a trading corporation has the right to incur liabilities for objects not expressly authorized, and to mortgage or sell, and, therefore, to lease its property, though, as Mr. Green points out, page 103, note, there is some conflict of authority where the sale of all the property is intended to transfer the business to a rival company or to subserve any other purpose than the payment of debts. Such was the case of the Clay Company (Plaintiffs' Brief, page 13, cited by Brice, page 102), and such, too, are the cases referred to in the Brief, pages 25–30; but that upon which special stress is laid is Taylor *vs.* The Chichester and Midland Railway Company (Brief, pages 35–45.) It may be safely inferred that Mr. Brice does not regard it as in conflict with the doctrine laid down, under the previous

point, from the fact that he, too, quotes largely from Lord Blackburn's opinion as giving a satisfactory exposition of the law. See Green's Brice, pages 35, 41, 227, 233, 488. Whether the purpose for which the liability was incurred in that case was or was not fairly within the scope of the power of the corporation might well be a question, but cases of that sort have no relevancy in this discussion. This is not a contract made in the course of the business of a private corporation, nor is it governed by the rules regulating the powers or liabilities of such organizations. It was an attempt to transfer the powers and duties and liabilities of a railway corporation to private individuals. By whatever name it is to be called, this was the object and effect. In considering its validity, it must be kept in mind that a railroad company, incorporated as a common carrier, invested with the power of eminent domain, to enable it to construct a public highway through the property of private citizens, irrespectively of their wishes, and designed to subserve great public uses, is not like a mere private partnership with limited liability. The opening up of highways has always been regarded as one of the highest functions of government; and no more important question to-day engages the attention of courts and legislatures in this country or Europe than that of the proper control and regulation of railways. The directors of a railway company are not, therefore, to be regarded as the authorized agents of partners in a private venture. They are also the agents of the State, discharging duties to the public, intrusted with franchises from the sovereign; and they can not, without the consent of the State, transfer those franchises and abdicate their duties.* From considerations of this

* "Railways possess also many extraordinary powers or franchises which partake more or less of this quality of sovereignty, and which it is not competent for the legislature to delegate to ordinary corporations. These are sometimes called the prerogative franchises of the corporation. They

character, to which any allusion, however brief, must be superfluous, the courts of this country and England have agreed in holding that a railroad corporation can not part with its franchises except when clearly authorized to do so by the authority which created it. It has commonly been attempted either by way of mortgage or of lease, and neither attempt has ever been successful. The more important decisions will be found collected in Angell & Ames on Corporations, section 191; 1 Redfield on Railways, 588–592, and in the notes to Green's Brice's Ultra Vires, pages 103–123. Among those cited attention, however, may be called specially to York and Maryland Line R. R. *vs.* Winans, 17 How., 30–39.

Black *vs.* Del. and Rar. Can. Co., 7 C. E. Green, 99.

Wood *vs.* Bedford R. R. Co., 8 Phila., 84, per Sharswood, J.

The real and only question, therefore, in this case is, whether the agreement with the plaintiffs did amount to such a transfer of the corporate franchises. Confessedly, if it be a lease it comes within the prohibition; and as this is well settled, the plaintiffs are involved in a curious dilemma, for, while the pleadings in the case show that they sue upon the contract in question as a lease, when they come to their argument it is impossible to tell whether they stand upon that ground or not. This at first sight seems unaccountable. But a moment's consideration will show the reason. If it be not a lease,

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exist in banks, which practically supply the currency of the country, or its representative, and railways, which have already engrossed the chief business of internal communication in this country, and almost through the civilized world. And both currency and internal communication between different portions of a State are exclusively the prerogatives of sovereignty. * * * * But the right to build and use a railway, and take tolls, or fares, is a franchise of the prerogative character which no person can legally exercise without some special grant of the legislature." Redfield on Railways. 87.

then the act of April 10th, 1867, relied upon as a ratification of the contract by the Legislature of New Jersey, is of no consequence. If it be a lease, and that statute does not amount to a ratification, then the contract is clearly void by the law of the State where the contract was made. This question was decided by the Court of Errors and Appeals in New Jersey in the well-considered case of Black *vs.* Del. & Rar. Canal Co., *ut supra.*

The language of this agreement itself would, under ordinary circumstances, be conclusive. The authority was conferred upon an executive committee to make a lease, and they did it. The language (page 29 of the Record) of the agreement upon this question is as follows: "Whereas, at a meeting of the stockholders of the Millville and Glassboro Railroad Company, held at Millville the fourteenth day of July, A. D. 1863, it was proposed to lease the railroad, and it was then judged best to refer the same to the next meeting of the board of directors, with power to act; and at the next meeting of that board, held on the same day and at the same place, the following resolution was offered, to wit:—

"*Resolved*, that Thomas H. Whitney, Ferdinand F. Sharp, and Richard D. Wood be appointed as an executive committee to conduct the general business of this company, and that they be empowered to lease the road in perpetuity or for one or more years, as they may deem best for the interest of the concern, taking proper care to contract with responsible lessees.

"On motion, it was resolved to amend the above resolution, so that any contract made by the therein-named executive committee should be submitted to the directors and be by them approved before said contract should be binding on this company. On motion, the above resolution as amended, was adopted.

"And whereas, in pursuance of this authority them in that behalf enabling, the party of the first part is desirous

to contract for the transportation of freight, mails, and passengers over their railroad, and the party of the second part has proposed to them to undertake the same, upon the terms and as hereinafter mentioned, and to furnish all the necessary rolling stock, labor, and materials, *and also to perform and fulfill all and singular the duties and obligations* hereinafter mentioned and assumed, which proposition the party of the first part has agreed to accept, upon the conditions and provisions hereinafter contained on the part of, and by the party of the second part, to be bound and kept.

"*First.*—Now, this contract and agreement witnesseth that the party of the first part does hereby, and for the purpose of enabling the party of the second part to fulfill this contract, intrust to their possession and care, and subject to the provisions of this contract, all the roadway and superstructure, buildings, machine-shops, offices, stations, rolling stock, machinery, implements, and materials on and along the line of said railroad, of which a schedule is hereto annexed, marked "A." And the said party of the second part hereby acknowledge the receipt of the said property for the purposes aforesaid, and the said property has been duly valued and appraised, and it is agreed that the valuation affixed to each article thereof in the said schedule is the just and true value thereof on the first day of August, A. D. 1863, being the time of the delivery of the property described to the party of the second part.

"*Second.*—That the party of the second part shall and will provide all the needful cars and engines for transporting, and will duly transport all passengers, mails, and freight, whether through or local, offering or delivered to them to be transported, *and shall and will fulfill all the duties and liabilities of the party of the first part to the public.*"

Then follow numerous other provisions equally

strong, and showing a grant of the exclusive use of the railroad for the period of twenty years. It is claimed, however, on various grounds that this is not a lease. It is said that it is not a lease because the term is confined to a period of twenty years. This reason is certainly novel. It has generally been supposed that the limitation of time is one of the characteristic features of a lease or term of years. Blackstone says in his Commentaries, page 140: "An estate for years is a contract for the possession of lands or tenements for some determinate period; and it takes place when a man letteth them to another for the term of a certain number of years agreed upon between the lessor and lessees, and the lessee enters thereon." "Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years; and therefore this estate is frequently called a term, *terminus*, because its duration is bounded, limited, and determined, for every such estate must have a certain beginning and certain end." This principle is elementary, and nothing could add to the force of the above citations.

It is also said that the fact that the contract is terminable at the option of the lessor shows that it is not a lease. In regard to this, it would perhaps be sufficient to say that such a clause in a lease is well known, and would be recognized and enforced by all lawyers. In Smith's Landlord and Tenant, page 85, the rule is briefly stated: "With regard to the *duration* of the term, it may be either for a number of years absolutely, or for a number of years determinable upon some contingency, *such, for instance, as the expiration of a life or lives.* * * * Sometimes the lease is for a certain number of years, but determinable sooner at the election of the parties or one of them; and of course, if it be specified which is to have the option, no difficulty on the subject can arise."

Comment on this would be useless. The fact is that this was a contract for the conveyance of everything the grantor had for the term of twenty years, to be terminated at the option of the lessor, upon three months' notice to the lessees. They, the lessees, had exclusive possession of the property, and were to perform and fulfill all the duties and obligations of the lessor. The definition of a lease, as given by Blackstone, is that "an estate for *years* is a contract for the possession of lands or tenements for some determinate period; and it takes place when a man letteth them to another for the term of a certain number of years agreed upon between the lessor and lessee, and the lessee enters thereon." Blackstone's Com., Book II., page 140.

This definition covers our case. But, even if this were not so, the contract is such a one as would be clearly *ultra vires*.

If it were simply one of the ordinary traffic contracts, so called, of railroad companies, possibly no objection could be made to it. But it is not. The rule is well laid down in Brice's Ultra Vires, page 305: "Corporations may not transfer to others their own peculiar powers and privileges."

Upon this proposition, the learned writer says:—

"Such a transfer, whether permanently and absolutely, *or only for a definite period*, it has been repeatedly decided, in the absence of statutable powers, is illegal. Thus, Turner, V. C., in Great Northern Railway Company *vs.* Eastern Counties Railway Company" (9 Hare, 306), "observed with reference to this question,

"'It is impossible to read the agreement between the plaintiffs and the East Anglican Railway Company *without being satisfied that it amounts to an entire delegation to the plaintiffs* of all the powers conferred by Parliament upon the East Anglican Railway Company.

* * * * It is framed in total disregard of the obligations and duties which attach to these companies, and is an attempt to carry into effect, without the intervention of Parliament, what can not lawfully be done except by Parliament in the exercise of its discretion with reference to the interest of the public. * * * * I think it is the duty of this court to withhold its interference when called upon to act in aid of agreements of such a nature.'"

(See further the other cases commented on in the same book, pages 307–309.)

Traffic arrangements are permissible, even without the authority of an act of the legislature. It is said that a corporation may carry on and extend its legitimate business by every legal means; it may, consequently, in the furtherance of these objects, enter into all such engagements with rival companies and other competing bodies as it may deem most conducive to its own interest, *provided, however, that it does* not, in so doing, either exceed its powers or enter into engagements which, however skillfully disguised, are only a transfer or delegation of special powers and privileges.

The language of the charter is (section 13), "and be it enacted that it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts."

To state that such a clause in a charter conferring important privileges and franchises authorizes the corporation to abnegate its functions, and delegate them to others, carries with it its own refutation. The rule is well stated by Mr. Brice, page 339: "Corporations may make all necessary arrangements for cheaply and expe-

ditiously developing or carrying on their particular business; but it is another thing to go beyond this—to enter into contracts, for instance, by which the exclusive control or the exclusive right of working the line is handed over to other parties. *All such arrangements, whatever their form, however disguised, are ultra vires and void.*"

See further the cases of Unrich *vs.* Birkenhead, &c., R. W. Co., 5 De G. & Sm., 562, and the other cases discussed and cited in the same book, page 339. An examination of these cases is conclusive of this question.

The only case which seems to encroach upon this doctrine, as examined in plaintiffs in error's brief, is The Midland R. W. Co. *vs.* The Great Western R. W. Co., L. R., 8 Ch. App., 841; but, as will be seen from the citation in that brief (page 18), Lord Justice James said:—"The Midland Railway Company and the Hereford Railway Company enter into arrangements, which, upon the face of them, seem to me to be perfectly consistent with every obligation of either company * * * * *It is said they are going to delegate their authority or some of their powers to the Midland Company; that it is in effect a lease or a transfer or a delegation of their powers to the Midland Company; that it is in effect a lease or a transfer or a delegation of the powers of the Hereford Company to the Midland Company. I see nothing in this agreement which amounts to any such delegation.*"

His Lordship then proceeds to show that what had been done was not in contravention of this. An examination of the opinions of the Lords Justices, and the argument of counsel, will show that it was practically conceded that if the agreement had been a lease it would have been *ultra vires.*

This is the case principally relied upon by the learned counsel for the plaintiffs in error. The principal stress of their argument rests upon it (pages 23–25 of their

brief). Not one case they have cited goes beyond it, and yet when it is examined it is found only to decide, in the language of Lord Mellish, that "They laid instructions before some competent counsel, and said, Draw us an agreement which will be legal, and shall, as far as possible, carry out our intentions. That is what I should suppose they did, and in my opinion whoever was employed to do that has done it successfully. He has drawn what appears to me to be a legal agreement."

It should be noted also that this case, and that of the Llanelly Co. *vs.* The R. W. Co., cited at page 30 of plaintiffs' brief, are both discussed by Brice (page 321), as are, for the most part, the authorities mentioned in subsequent pages; and that, perhaps, the necessities of their case have somewhat affected the judgment of the learned counsel, as the conclusions which they are able to extract from these decisions or opinions are quite in conflict with those of the author and his editor. It may also, perhaps, be worth while to point out, by way of answer to the third point made in the brief (page 49, *et seq.*), that it is the sovereign State, and not the stockholders, that objects to the usurpation of a public trust, and that this contract had not been performed, but on the contrary, the present action was to recover damages for the prevention of performance. If the company had no power to transfer its franchises, it could not become liable in damages by resuming them. For the services rendered the plaintiffs obtained compensation, and there can be no legal wrong in preventing them from doing what it would have been illegal for them to do.

See also cases cited in note to page 611 Green's Brice's Ultra Vires.

3. But it is contended that the act of April, 1867, is a ratification of the supposed power of leasing. And here the argument that the contract is not a lease is

necessarily dropped, because the ratification rests upon the use of the term *lessees* in the act of Assembly mentioned. That statute was passed not to grant powers to the Millville and Glassboro Railroad Company, but to impose restrictions upon it. It was enacted "that it should be unlawful for the directors, lessees, or agents of said railroad to charge more than three and a half cents per mile for the carrying of passengers," &c.

The use of the word *lessees* is supposed to give the desired ratification, or, to express it more properly, to give the power of leasing. What then becomes of the words "directors and agents"? Clearly the term as used must be construed lawful lessees, and as no power had then been conferred of leasing, it could only operate in case the legislature should confer such a power. Every one knows that this is a matter of common occurrence, and that upon application the right would be given. The person who drew the act of Assembly doubtless had this in view, and made the act broad enough to cover all contingencies. But he certainly never intended, nor did the legislature, to grant the right of leasing the road.

The principles of interpretation are well settled:

The recitals in a private statute are merely evidence in general that the facts were so represented to the legislature—not that they actually existed. McKennon *vs.* Bliss, 21 N. Y., 206.

The recital of a fact in a statute is not evidence of it against a suitor. Parmelee *vs.* Thompson, 7 Hill, 77.

A grant of special powers to a corporation will not be enlarged by *intendment* to include a power not expressly conferred. Weil *vs.* Record, 9 C. E. Gr., 169.

The public rights in the highways of the State can be impaired or interfered with by nothing short of the authority conferred by the sovereign power. That authority must be expressly given, or if conferred by implication, it must be by necessary implication.

R. R. Co. *vs.* Newark, 2 Stock., 353.

State *vs.* Hoboken, 6 Vr., 205.

Atty. Gen. *vs.* M. & E. R. R. Co., 4 C. E. Gr., 387, 5 *id.*, 530.

And see further, upon the construction of statutes of this character, Miller *vs.* Canal Commissioners, 9 Harr. (21 Penn St.), 23.

Howard *vs.* Earl of Shrewsbury, L. R., 2 Ch. App., 759–774.

Kent Coast Ry. Co. *vs.* London, Chatham, &c., Co., L. R., 3 Ch. App., 656.

The last case is of great force, and is really decisive of the question.

It is submitted, therefore, that as the defendant was not a party to the agreement sued on, and the contract was one which it was not competent for the parties to make, the plaintiffs showed no cause of action, and the instruction of the court to find for the defendant was correct, and the judgment should be affirmed.

SAM'L DICKSON,
JOHN C. BULLITT,
A. BROWNING,
For West Jersey Railroad Company.

Thomas	October Session, 1879.
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SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

1. The merger of the Millville and Glassboro Railroad into the West Jersey Railroad Company did not necessarily create a new corporation; whether such be its effect depends upon the language of the agreement and the legislative intent manifested in the statute. Central Railroad Company *vs.* Georgia, 2 Otto, 665.

The conveyance was by the Millville and Glassboro R. R. Co., as a vendor, which was taken by the vendee subject to the existing debts, liabilities, and obligations; *i. e.*, the debts, liabilities, and obligations continued to be those of the Millville and Glassboro R. R. Co., although the property remained liable for them.

2. Where the act is absolutely *ultra vires* of the corporation, it is necessarily void, and incapable of ratification by the stockholders, and continues so, in spite of acquiescence. This is a postulate in all the discussions upon the subject. See the extract from the opinion of Blackburn, J., at pages 40, 41, of the brief of plaintiffs in error. See, also remarks of Selden, J., in Bissell *vs* R. R. Co., 22 N. Y., pages 289, 290. If this were not true, the corporation itself could never take advantage of this defense.

Baron Parke states the proposition thus:—"Where a corporation is incorporated by act of Parliament for particular

purposes with special powers, their deed, though under the corporate seal, does not bind them if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactment, that the deed *ultra vires*—that is, that the legislature meant that such a deed should not be made." This is quoted with approval in the case of Shrewsbury and Birmingham R. W. Co. *vs.* Western R. R. Co., 6 H. L. C., page 113. See, also, the whole opinion for a clear statement of the law upon the subject.

This defense has been successfully set up by the corporation as against a creditor in repeated instances. See Pierce *vs.* R. R. Co., 21 Howard, 441; Steam Navigation Co. *vs.* Dandridge, 8 Gill & J., pages 248, 319; Wreckler *vs.* Bank, 42 Maryland, 581, and cases cited by Brice, and by Selden, J., in Bissell *vs.* R. R. Co.

3. The principle upon which the courts have held the defense of *ultra vires* inadmissible in cases where the consideration had been received, is perhaps the same as that upon which, in contracts with those not *sui juris*, the property has been followed, or a lien has been declared wherever equity required it to be done. Wright *vs.* Leonard, 11 C. B. N. S. (103 E. C. L.), 258, and see note by the editor.

In the case of the National Bank *vs.* Matthews, 8 Otto, 621, Mr. Justice Swayne points out that "the statute does not declare such a security void. It is silent upon the subject." And so, in the previous case of Gold Mining Company *vs.* Bank, 6 Otto, 640, it was held that the restriction in the amount of the loan to any one customer was declaratory merely, and that it did not make the loan itself illegal. But it has always been held that, where the contract was expressly forbidden, it was necessarily void.

See Ins. Co. *vs.* Lawrence, 3 Wendell, 482.

Ins. Co. *vs.* Ins. Co., 7 Wendell, 31.

This principle applies to the present contract, inasmuch as in New Jersey, a contract clearly *ultra vires* is prohibited and declared illegal.

The third section of the act of 1846, concerning corporations (Nix. Dig., 168), provided that in addition to the powers enumerated in the first section of the act (which are the ordinary powers of all corporations), "and to those expressly given in its charter, or in the act under which it is or shall be corporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to be exercised of the powers so enumerated and given," must be taken as a prohibition of any acts not within the scope of the powers herewith and contracts in contravention of it are illegal.

R. R. Co. *vs.* R. R. Co., 20 N. J. Eq., 543.

Hence, it was *held* that a contract by one railroad company with another, for rates of freight and fare over extensions not then authorized and built, was *ultra vires* and, therefore, illegal, and could not be enforced.

4. It is suggested in the brief of the plaintiffs in error, page 32, that the corporation would remain liable to the public; but this could not be correct, if it were authorized to make the lease. If the lease were valid the responsibility would rest exclusively with the lessees. The responsibility in the case of the R. R. Co. *vs.* Winans, 17 Howard, page 30, continued, because it was held that the corporation could not absolve itself from the performance of its obligations without the consent of the legislature, page 39. Of course, if it had the consent it could do so.

Even where another company has only "running powers" over the line of a company's railway, it will not be liable for the negligence of the other's servants (Wright *vs.* R. W. Co., L. R., 8 Ex., 137), and *a fortiori*, if the plaintiffs were lessees, under due authority of law, their possession would be exclusive, and for the negligence of their servants they alone would be accountable.

5. The claim being for "the value of the contract," there could have been no recovery, had the contract not been under seal, upon an *indebitatus assumpsit*. 1 Chitty on Pleading, 340.

The month's wages to which a domestic servant is entitled for improper dismissal can not be recovered under the common count for work and labor.

Fewings *vs.* Tisdall, 1 Excheq., 295.

SAM'L DICKSON,
For Defendant in Error.

No. 169. *October Session, 1879.*

Supreme Court of the United States.

IN ERROR.

GEORGE W. THOMAS, ALFRED S. PORTER, AND NATHANIEL F. CHEW

vs.

THE WEST JERSEY RAILROAD COMPANY.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

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